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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CHEVRON CORPORATION, *et al.*,
Petitioners,
v.
STATE OF ARIZONA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in order to secure summary judgment in a case brought under section 1 of the Sherman Act, defendants not only must demonstrate that the evidence is as consistent with independent action as with conspiracy, *see Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), but also must persuade the court that permitting a jury to rest a finding of conspiracy on such evidence would significantly deter "beneficial procompetitive behavior."

2. Whether a jury may permissibly infer an agreement to fix prices based upon evidence of parallel pricing together with evidence that some sellers individually announced unilaterally determined price increases to the press in the hope that other sellers would follow by promptly raising their own prices as well.

3. Whether a jury may permissibly infer an agreement to restrict output merely because the fact of a shortage, when coupled with evidence of business practices that were fully consistent with each producer's individual self-interest, makes such an inference "plausible," irrespective of the strength of the opposing inference of independent action.

PARTIES BELOW

The appellants in the court of appeals were the States of Arizona, California, Oregon, and Washington, which are respondents here.

The appellees below were Chevron Corporation, Atlantic Richfield Company, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California, which are petitioners here. Petitioners' listing of subsidiaries and affiliates pursuant to Rule 29.1 appears in App. E.

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PETITION FOR WRIT OF CERTIORARI

Chevron Corporation, Atlantic Richfield Company, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 906 F.2d 432. The opinion of the district court (App. B) is reported at 656 F. Supp. 1296.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1990. A timely petition for rehearing and suggestion for rehearing en banc were denied on January 8, 1991 (App. C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, in pertinent part provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . .

Rule 56(c) of the Federal Rules of Civil Procedure in pertinent part provides:

> . . . The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

These consolidated actions were brought by the respondent States of Arizona, California, Oregon, and Washington in the wake of the Arab oil embargo of 1973-74. They alleged that petitioners, seven major integrated oil companies with operations on the west coast, conspired to create a shortage of gasoline and, prior to the shortage, had conspired to end various gasoline "price wars" among operators of retail service stations.

Following more than ten years of exhaustive discovery and full briefing and argument, the district court, applying the standard set forth by this Court in *Matsushita*

Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), granted summary judgment for petitioners:

> Many of the inferences of collusion that the plaintiffs draw from the evidence must be categorized as *non sequitur*. Some of the inferences are based upon facts that could be considered to be in harmony with the existence of a conspiracy if the existence of a conspiracy be assumed. However, such facts are equally in harmony with competitively motivated individual conduct, and we know from *Zenith* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of conspiracy." . . . None of the facts relied upon by the plaintiffs constitute evidence 'that tends to exclude the possibility that the alleged conspirators acted independently,' as is required by *Zenith*.

App. B at 71a.

The Ninth Circuit did not quarrel with the district court's determination that there was no evidence tending to exclude the possibility of independent action. The court of appeals held, however, that before granting summary judgment for defendants a trial judge must do more than just determine that the evidence is as consistent with independent action as with conspiracy: the judge also must be persuaded that "permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." App. A at 13a. Because the Ninth Circuit believed that petitioners' conduct relating to pricing and output was not "significant[ly] procompetitive," *id.* at 11a, it reversed and remanded for trial.

1. *Background.* Petitioners refine and sell gasoline at wholesale to operators of franchised retail service stations at what are called "tank wagon prices." App. B at 72a. During the early 1970s, gasoline price wars among retail service stations were common. Such price wars

usually were initiated by retailers who were not affiliated with a major refiner. *Id.* But once such retailers began cutting prices, all retailers faced the need to follow suit. *Id.* Petitioners, "in order to enable their [franchised] dealers to remain competitive, share[d] with them the burden of having to reduce the retail prices by giving them discounts from the tank wagon prices." *Id.* at 72a-73a.

At some point during any price war, a major refiner would eliminate its discounts and raise its wholesale prices to their previous levels. *Id.* at 73a. "It then carefully watched for . . . reactions." *Id.* at 78a. Other refiners "pondered for themselves whether or not to follow and make their determinations pursuant to their individual self-interests." *Id.* at 82a. "Sometimes they did not follow and, after a few days, the 'would be' leader was obliged to restore the dealer's allowance." *Id.* at 78a. But when other refiners did follow the lead and raise their wholesale prices, retail dealers normally "respond[ed] promptly with corresponding increases in their retail prices to consumers. . . . Thus, the market prices return[ed] to the levels from which the decline started." *Id.* at 73a. The entire process then was likely to recur. *Id.* Indeed, between July 1971 and August 1972, "there occurred more than twenty separate price restorations [in the Los Angeles area alone]." *Id.* at 81a. As a result, charts showing weekly movements of average retail prices over this period "give a sharp 'saw-tooth' appearance." *Id.* at 74a.

The repetitive cycle of gasoline price wars ended in the latter part of 1972, when a combination of factors, including federal price controls and an unprecedented surge in demand, led to a shortage of gasoline on the west coast. *Id.* at 93a. The explosion in demand induced a dramatic increase in output, as gasoline production reached record levels, *id.* at 94a, with petitioners' refineries operating at the "maximum sustainable rate."

App. A at 59a. To meet the growing appetite for gasoline, some of the petitioners "built new refineries, others enlarged existing refineries." App. B at 94a. Not even increased production and expansion of capacity, however, were sufficient to keep pace with demand, and "[i]n the latter part of 1972 and throughout most of 1973, there was . . . a shortage of gasoline." *Id.* at 93a.

2. *Litigation in the district court.* The respondent States brought these actions in the mid-1970s, alleging that petitioners had conspired in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, to fix the price and restrict the supply of gasoline. The actions were consolidated in the United States District Court for the Central District of California in 1976. Jurisdiction rested on 28 U.S.C. § 1331.

Respondents contended (1) that during the price wars of the late 1960s and early 1970s petitioners had conspired to raise prices by eliminating dealer discounts and (2) that petitioners then conspired to create a shortage of gasoline. Massive discovery, however, failed to uncover any direct evidence or conspiracy. Even though more than four million pages of documents had been produced, "there is no sign of a paper trail pointing to a conspiracy, and the taking of more than four hundred depositions has failed to produce any testimony disclosing knowledge of collusive action in setting or changing wholesale prices." *Id.* at 81a. Respondents perforce relied upon purely circumstantial evidence.

Respondents' allegation that "the sharp restorations to 'normal' tank wagon prices were agreed upon in advance," *id.* at 73a, rested principally upon the mere claimed existence of parallel pricing. The district court noted, however, that parallel pricing "is to be expected where, as here, the products are fungible and competition is intense." *Id.* at 81a.

Respondents further claimed that some of the petitioners publicly posted prices at their plants, or issued press releases or responded to press inquiries about their prices, in order to "facilitat[e]" the alleged price parallelism. *Id.* at 83a. But the evidence showed that only "[s]ome of the [petitioners] regularly posted their tank wagon prices; some did not." *Id.* at 85a. The evidence further showed that petitioners handled press inquiries about prices in different ways: "[s]ome of the [petitioners] regularly announced their prices publicly and informed the press accordingly; some authorized their employees to answer press inquiries regarding pricing decisions already made; others did not talk to the press at all." *Id.* at 86a. The district court concluded that public announcements or acknowledgments of price increases were not, in any event, evidence of collusion:

> when one of the [petitioners] was tired of a price war and decided to take a chance and raise its prices, it would be entitled to proclaim its decision immediately and loudly in the hope that the industry would follow promptly and not leave it alone in an above the market position. . . . Nothing in the [case-law] holds that, once a decision to increase a price has been made, the interested parties are precluded from immediately announcing it or learning of it.

Id. at 84a.

As to their claim of a conspiracy to restrict the supply of gasoline, respondents alleged broadly that petitioners "agreed to accomplish the shortage by reducing their respective domestic productions of crude oil, curtail their plans for building additional refining capacity, make unnecessary allocations of inventories and production that would eliminate sales to independents, and hold down production of crude oil in Iran and Saudi Arabia." *Id.* at 90a-91a. The district court carefully considered respondents' evidence and found "no indication of a mutual agreement to create a shortage of gasoline." *Id.*

at 94a. To the contrary, the court determined that "[t]he evidence submitted . . . shows quite clearly that whatever the [petitioners] did or did not do stemmed from individual decisions rather than conspiracy." *Id.*

The district court concluded:

> . . . [N]ow, after more than ten years and great expenditure of effort and money by all concerned, it has become evident that the [respondents] simply cannot establish any part of the conspiracy that they allege. All that the [respondents] present are the self serving inferences drawn from facts that are far from compelling a conclusion of conspiracy. Such facts are at least as consistent with a finding of individual action and vigorous competition. Under the teachings of *Zenith* . . . summary judgment is required.

Id. at 96a.

3. *The Ninth Circuit's opinion.* The Ninth Circuit reversed and remanded for trial on respondents' allegations of conspiracy.

a. The Ninth Circuit acknowledged the applicability of the standard set forth in *Matsushita*, *i.e.*, that " 'conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.' " App. A at 8a, quoting *Matsushita*, 475 U.S. at 597 n.21. Nonetheless, the court refused to believe that *Matsushita* requires summary judgment in such circumstances. Instead, the court thought it also was necessary to balance "the protection of independent conduct [against] the costs associated with the potential decrease in strict antitrust enforcement." *Id.* at 11a. This balancing process, the court explained, requires the trial court to permit a jury to find liability whenever the evidence plausibly supports an inference of conspiracy—even when the competing infer-

ence of independent action is equally or more plausible—unless permitting such an inference "would have the effect of deterring *significant procompetitive* conduct." *Id.* (emphasis added).

The Ninth Circuit articulated its new standard for summary judgment as follows:

> [W]here an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) *permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior.*

Id. at 13a (emphasis added).

b. Applying this newly formulated test to respondents' price-fixing claim, the Ninth Circuit agreed with petitioners that it would be improper to "permit[] an inference of conspiracy from the parallel pricing evidence alone." *Id.* at 23a. The court determined, however, that an inference of conspiracy could rest upon parallel pricing plus evidence that some of the petitioners publicized their prices in a manner that "facilitate[d]" such pricing. *Id.* at 29a.

The Ninth Circuit noted that three of the petitioners posted their prices "for public inspection, at either their company headquarters, division offices, or bulk plants," *id.* at 31a, that "each of the [petitioners] except ARCO, Union, and Gulf engaged in the practice of publicly announcing, in press releases, their decisions to withdraw dealer assistance and to restore tankwagon prices," *id.* at 24a, and that Exxon, which ended its practice of issuing press releases in 1969, "continued to respond to press inquiries concerning its price moves." *Id.* at 24a n.10. The court further noted evidence that such announcements or acknowledgements of price increases were made

"for the purpose of quickly informing competitors of the price change, in the express hope that these competitors would follow the move," *id.* at 24a—a purpose the court found further evidenced by direct contacts some of the petitioners had made to verify dealer support levels, principally during the period before this Court's decision in *United States v. Container Corp.*, 393 U.S. 333 (1969). *Id.* at 35a.

The Ninth Circuit recognized that the evidence relating to price publication was fully consistent with independent action, because "independent considerations of self-interest would have led a company to choose to publish a price increase that it had decided to make." *Id.* at 28a-29a. Stating, however, that public announcements of price changes "served little purpose other than to facilitate [parallel pricing]," *id.* at 29a, the court concluded that "permitting an inference of conspiracy from the fact of such publication would [not] significantly deter *important* legitimate conduct." *Id.* (emphasis added). The court therefore held that "the evidence concerning the purpose and effect of price announcements, when considered together with the evidence concerning the parallel pattern of price restorations, is sufficient to support a reasonable and permissible inference of an agreement . . . to raise or stabilize prices." *Id.* at 26a.

c. The Ninth Circuit then turned to respondents' claim of a conspiracy to restrict output. Respondents did not dispute that petitioners' refineries had been "operating at the 'maximum sustainable rate,'" *id.* at 59a, and that several petitioners had built new refineries or had expanded their refinery capacity. They contended, however, that petitioners "agreed to engage in various activities designed to reduce the domestic supply of petroleum products . . . [including] agree[ing] to exchange information concerning actual production levels, expected future demand, and expected supply projections . . . [and] conspir[ing] to reduce the amount of crude

oil lifted overseas and shipped into the United States." *Id.* at 55a.

The Ninth Circuit agreed with petitioners that "an inference of conspiracy could not permissibly be drawn" from the mere publication or obtaining of long-term forecasts of aggregate supply and demand, which was the only "exchange of information" revealed by the evidence. *Id.* at 61a. Explaining, however, that "it is not our task to decide whether we think that an inference of innocent conduct is more plausible than an inference of conspiracy," *id.* at 64a, the court held that the issue must go to a jury because respondents "have offered a plausible conspiracy theory," *id.* at 60a, and permitting an inference of conspiracy "will not have an undue deterrent effect on the proper dissemination of petroleum supply and demand information." *Id.* at 62a n.23.

The court further held that the jury also must be permitted to infer a conspiracy from the fact that several of the petitioners had participated in determining the level of crude oil production for Iranian and Saudi Arabian joint ventures in which they were members, *id.* at 62a-65a—even though it was undisputed that crude oil imports from those countries had more than doubled between 1969 and 1973. The court acknowledged that the evidence was fully consistent with lawful action, but it was satisfied that respondents' theory of conspiracy "is plausible" and that permitting an inference of conspiracy would not "have the effect of deterring *significant procompetitive* conduct." *Id.* at 64a (emphasis added).

REASONS FOR GRANTING THE WRIT

1. The decision below squarely conflicts with this Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In *Matsushita*, this Court held that circumstantial evidence that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy" and thus is not sufficient to defeat a defendant's motion for summary judgment. 475 U.S. at 588. *See also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984); *First National Bank v. Cities Service Co.*, 391 U.S. 253, 280 (1968). In contrast, the Ninth Circuit held in this case that such evidence *can* support an inference of antitrust conspiracy and *is* sufficient to defeat summary judgment whenever a court determines that that result will not "pose a significant deterrent to *beneficial procompetitive* behavior." App. A at 13a (emphasis added).

No other circuit has interposed the additional obstacle to summary judgment erected by the Ninth Circuit in this case. Those other courts properly uphold summary judgment for antitrust defendants where, as here, plaintiffs offer only ambiguous circumstantial evidence and fail to come forward with any evidence " 'that tends to exclude the possibility' " of lawful independent conduct. *Matsushita*, 475 U.S. at 588, quoting *Monsanto*, 465 U.S. at 764. *See Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1171-74 (7th Cir. 1990) (affirming summary judgment in case involving evidence of price publication and parallel pricing); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 994-96 (4th Cir. 1990) (same). *See also, e.g., Riverview Invs., Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 485 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 151 (1990); *H. L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005, 1014-17 (2d Cir. 1989); *Health Care Equalization Comm. v. Iowa Medical Soc.*, 851 F.2d

1020, 1031-32 (8th Cir. 1988); *Houser v. Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1232-33 (3d Cir. 1988); *Gibson v. Greater Park City Co.*, 818 F.2d 722, 723-25 (10th Cir. 1987). Indeed, respondents' counsel, describing the decision below as an "evolutionary synthesis," advertise that whereas other circuits "have required plaintiffs to present evidence that 'tends to exclude' the possibility of innocent conduct . . . the Ninth Circuit has rejected the notion that *Matsushita* and *Monsanto* created such an evidentiary burden for plaintiffs." M. Spiegel & W. Liao, *Avoiding Summary Judgment After* Matsushita *and* Monsanto, 5 Antitrust 12 (Spring 1991).

The Ninth Circuit's revision of *Matsushita* significantly impairs the use of summary judgment as a means of screening out meritless conspiracy claims. As respondents' counsel claim, the court's ruling implies that once a plaintiff makes a minimal showing in support of "a feasible theory of conspiracy . . . , a defendant cannot win summary judgment, *no matter how strong its inference of innocence*." *Id.* (emphasis added). As a result, the decision below will burden the courts with unnecessary and enormously time-consuming trial proceedings, subject defendants to baseless and expensive antitrust trials, and encourage other potential plaintiffs to initiate yet more litigation of the same stripe.

But the larger importance of this case lies in the fact that the Ninth Circuit has discarded the basic statutory requirement of concerted action. This Court repeatedly has stressed that under section 1 of the Sherman Act, "[i]independent action is not proscribed." *Monsanto*, 465 U.S. at 761. *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). In contrast, the decision below permits imposition of liability for lawful, unilateral action—such as the issuance of press releases—whenever such action, in the eyes of a reviewing court, is not "significant[ly] procompetitive." App. A at 11a. The Ninth Circuit thus has subverted section 1's

essential requirement of a "contract, combination . . . or conspiracy."

This leaves those who seek to comply with the Sherman Act in confusion and uncertainty. Businessmen now must not only avoid concerted action but also conform their conduct to a standard of "*beneficial procompetitive* behavior." *Id.* at 13a (emphasis added). That vague precept, which has no basis in the Sherman Act itself, gives no coherent guidance to those transacting business or defending antitrust actions. This Court should grant review in order to restore clarity and to correct the Ninth Circuit's maverick departure from settled law.

2. The Ninth Circuit's application of its erroneous two-part test produced results that conflict with bedrock antitrust principles.

First, the Ninth Circuit held that parallel pricing, when coupled with a (partially) parallel practice of publicizing price changes, is enough to justify an inference of conspiracy. But as this Court has pointedly observed, " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act." *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). That observation logically extends not just to parallel pricing but to all forms of parallel behavior, including price announcements and acknowledgements. Sellers have "the lawful right to publish prices," *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980), and conscious price leadership is expressly permissible. *United States v. International Harvester Co.*, 274 U.S. 693, 708-09 (1927). Consequently, the fact that publication of prices may facilitate price leadership or parallel pricing is legally irrelevant where, as here, there is no "evidence that tends to exclude the possibility that the [sellers] were acting independently." *Monsanto*, 465 U.S. at 764. The Ninth Circuit's erroneous holding that parallel pricing and price publication together are sufficient to support an inference of conspiracy threatens

sellers in all industries marked by parallel prices with antitrust liability for wholly lawful conduct that "manifests only the workings of a competitive market." Brief for the United States at 8, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (No. 83-2004). This issue is one of fundamental importance to the administration of the Sherman Act.

Second, the Ninth Circuit held that the mere fact of a product shortage, when coupled with evidence of ordinary and otherwise lawful business conduct, makes an inference of a conspiracy to restrict supply "plausible" and therefore permissible. That relaxation of the *Matsushita* standard allows juries to impose strict liability for product shortages. This Court should intervene to ensure that juries and courts impose antitrust liability under section 1 only when the preponderance of the evidence demonstrates the existence of an unlawful *agreement* to restrain trade.

I. THE NINTH CIRCUIT'S TWO-PART TEST FOR SUMMARY JUDGMENT CONFLICTS WITH *MATSUSHITA* AND IMPROPERLY EXTENDS SECTION 1 OF THE SHERMAN ACT TO REACH PURELY UNILATERAL CONDUCT

In *Matsushita*, this Court articulated "the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case." 475 U.S. at 576. Noting that "antitrust law limits the range of permissible inferences from ambiguous evidence," the Court declared that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy," *id.* at 588, even if the defendants "had a plausible reason to conspire." *Id.* at 597 n.21. This standard ensures that juries will not be left free to impose liability for unilateral conduct that lies outside the scope of section 1 of the Sherman Act.

The standard articulated in *Matsushita* derives most immediately from *Monsanto*, where this Court held that

to survive a motion for summary judgment (or directed verdict) an antitrust plaintiff must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. *Monsanto*, 465 U.S. at 764. This means that the plaintiff must proffer "direct or circumstantial evidence that reasonably tends to prove that the [alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* at 764, quoting *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F. 2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). As *Matsushita* makes clear, evidence of conduct that is as consistent with independent action as with conspiracy does not suffice to permit a reasonable jury to find such a "common scheme."

The district court below studiously applied the *Matsushita* test in granting petitioners summary judgment, finding that "[n]one of the facts relied upon by the [respondents] constitute evidence 'that tends to exclude the possibility' that [petitioners] acted independently." App. B at 71a. The Ninth Circuit, however, relieved respondents of any obligation to present such evidence, reasoning that this Court did not mean what it said in *Matsushita*:

> We do not take [the *Matsushita* test] as suggesting that a district court may grant summary judgment whenever the court concludes that inferences of conspiracy and innocent conduct are equally plausible.
>
> * * * *
>
> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct.

App. A at 8a-9a, 10a.

According to the Ninth Circuit, what this Court meant to say (or should have said) in *Matsushita* was that such evidence *does* support an inference of conspiracy, and thus allows a plaintiff to defeat summary judgment, *unless* the defendants can persuade the court that permitting such an inference "would have the effect of deterring significant procompetitive conduct," *id.* at 11a—that is, "would pose a significant deterrent to beneficial procompetitive behavior." *Id.* at 13a. The court held that only when "the defendant has made such a showing, [must] the plaintiff . . . come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully." *Id.* at 14a.

Nothing in *Matsushita* or *Monsanto* supports the approach followed by the Ninth Circuit in this case. To the contrary, *Monsanto* held that it is legally impermissible to infer a conspiracy when a manufacturer terminates a price-cutting dealer in response to complaints from other dealers, *not* because such an inference would deter significant procompetitive conduct but because it "could deter or penalize *perfectly legitimate* conduct," 465 U.S. at 763 (emphasis added), and "'would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute.'" *Id.* at 764, quoting *Edward J. Sweeney & Sons*, 637 F.2d at 111 n.2. Precisely the same reasoning supported the district court's award of summary judgment to the petitioners in this case.

The Ninth Circuit's reformulation of the *Matsushita* test fundamentally misconceives the scope of section 1 of the Sherman Act, which prohibits only those unreasonable restraints of trade that result from "contract, combination, . . . or conspiracy." While "the basic distinction between concerted and independent action . . . in theory [is] reasonably clear," it often is "difficult to apply in practice" because the economic effect can be "similar or

identical" and, "judged from a distance, the conduct of the parties in the various situations can be indistinguishable." *Monsanto*, 465 U.S. at 762. That is why this Court held in *Matsushita* and *Monsanto* that where the evidence is as consistent with unilaterial action as with conspiracy, a section 1 case cannot go to a jury unless there is additional evidence that "tends to exclude" the possibility of independent action.

In place of the *Matsushita* test, which is grounded in section 1's prohibition of concerted action, the Ninth Circuit has substituted a new inquiry—whether the defendants' conduct was significantly procompetitive—that has nothing to do with the existence *vel non* of a conspiracy. This loosens antitrust conspiracy suits from their statutory moorings: the judiciary becomes a roving legislature, empowered to impose liability, or to permit juries to impose liability, on the basis of *ad hoc* judgments concerning whether the defendants' conduct was significantly or beneficially procompetitive, without regard to whether that conduct was the product of agreement. The decision below thus is fundamentally at odds with the underlying statutory scheme, whereby unilateral conduct "is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Copperweld*, 467 U.S. at 767.

The Ninth Circuit never explained what criteria a trial court is to use in assessing whether conduct is adequately procompetitive. But its opinion appears to equate "significant procompetitive conduct" with " 'price-cutting activities,' " App. A at 11a, quoting *Matsushita*, 475 U.S. at 594, thereby seeking to relegate *Matsushita* (with its central emphasis on the requirement of concerted action) to its facts as a case of alleged predatory pricing. That was clear error. The statute forbids equally all "agreements to raise *or* lower prices," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) (emphasis added), but it is indifferent to the actual level or

direction of prices so long as they are arrived at independently rather than pursuant to agreement. The Ninth Circuit fundamentally misread section 1 when it held, implicitly but unequivocally, that independent competitive practices leading to higher prices must be judged by a different and harsher standard than those which lead to lower prices.

The reason given by the Ninth Circuit for reformulating the *Matsushita* test does not withstand analysis. The court maintained that allowing a trial judge to assess the "relative weight" of competing inferences of conspiracy and independent action would constitute a "dramatic judicial encroachment on the province of the jury" by "essentially convert[ing] the judge into a thirteenth juror who must be persuaded before an antitrust violation may be found." App. A at 9a. That assumes, incorrectly, that the *Matsushita* standard focuses on the inferences that the trial judge personally would draw from the evidence, rather than on the inferences the judge determines could be drawn by a reasonable jury. All *Matsushita* requires is that the trial court fulfill its traditional role on a motion for summary judgment, or directed verdict, or judgment *n.o.v.*—that is, to determine "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In an action brought under section 1 of the Sherman Act, this means that the trial court must determine whether there is sufficient evidence to permit a reasonable juror to find that it is more likely than not that the defendants conspired. *See Matsushita*, 475 U.S. at 588. The unexceptional process by which a trial judge evaluates the evidence and makes that determination on motion for summary judgment obviously does not convert the judge into a thirteenth juror.

II. THE NINTH CIRCUIT'S HOLDING THAT PARALLEL PRICING AND PRICE PUBLICATION TOGETHER ARE SUFFICIENT TO SUPPORT AN INFERENCE OF CONSPIRACY IMPROPERLY ALLOWS LIABILITY TO BE IMPOSED FOR MERE CONSCIOUS PARALLELISM

This Court recognized long ago that merely because "competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition." *International Harvester*, 274 U.S. at 708-09. The Ninth Circuit held in this case, however, that price leadership and parallel pricing are sufficient to support a finding of conspiracy if, in addition, some sellers issue press releases or respond to press inquiries concerning their price increases (or otherwise publicly post prices) so that "competitors could quickly learn of, and respond to," those prices. App. A at 26a. By so holding, the Ninth Circuit has transformed section 1 of the Sherman Act from a prohibition against price-fixing agreements into a prohibition against unilateral conduct that might facilitate otherwise lawful price leadership.

The Ninth Circuit did not assume that petitioners' price announcements were incompatible with or tended to exclude the possibility of independent action. To the contrary, the court conceded that "independent considerations of self-interest would have led a company to choose to publish a price increase that it had decided to make." *Id.* at 28a-29a. The court reasoned, however, that because, in its view, the practice of promptly announcing price changes facilitates parallel pricing, that practice cannot be justified as "*important* legitimate conduct," *id.* at 29a (emphasis added), and thus could support an inference of conspiracy. This reasoning permits juries to find antitrust conspiracies based on nothing more than consciously parallel business practices that further each defendant's own economic self-interest.

Ever since this Court's decision in *Theatre Enterprises*, it has been settled antitrust doctrine that consciously parallel business behavior, without more, does not constitute a conspiracy in violation of section 1 of the Sherman Act and is not probative of such a conspiracy. *See, e.g., Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F.2d 910 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965). In industries comprised of relatively few sellers of a fungible commodity, consciously parallel pricing is often described as "interdependent in the sense that each [firm] is required as a matter of normal business practice to take into account competitors' likely reactions in making pricing decisions." *United States v. General Motors Corp.*, 1974-2 Trade Cas. (CCH) ¶ 75,253 at 97,667 (E.D. Mich. 1974). Courts uniformly have held that such independent pricing is not the product of agreement within the meaning of section 1, because each seller is still acting unilaterally in deciding to initiate a price increase or to follow the lead of another:

> Pricing cannot be considered pursuant to an agreement merely because the ability of one seller to sell at certain prices depends to some extent on the prices charged by his competitors. The following or copying of a competitor's price in the exercise of independent business judgment is not unlawful; a manufacturer can make a price decision even if it is likely, hoped or even expected that competitors will learn of the announcement and may reasonably be expected to follow.

Id. Accord, e.g., Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989).

Acknowledging this unbroken line of authority, the Ninth Circuit held that the parallel pricing relied upon by respondents was insufficient, without more, to support an inference that petitioners had agreed to fix prices. According to the court, the number of "significant rivals"

was "sufficiently small" to make it "plausible" that parallel pricing resulted from mere oligopolistic interdependence, which "is generally considered insufficient to establish a violation of the Sherman Act." App. A at 20a, 22a. The court recognized that "permitting an inference of conspiracy from the parallel pricing evidence alone would result in an anticompetitive dislocation by distorting independent pricing decisions." *Id.* at 23a. Nevertheless, the court went on to hold that a jury could permissibly infer a price-fixing conspiracy from the additional fact that most (but not all) of the petitioners at various times had either promptly announced or acknowledged their price increases to the press or otherwise publicly posted them at their facilities.

The Ninth Circuit cited no evidence that any petitioner's decision promptly to disclose its price increase was any less independent than the decision to increase prices itself. But the court was concerned that such disclosure can facilitate parallel pricing "by ensuring that competitors could quickly learn of, and respond to, [price increases]." *Id.* at 26a. Solely for this reason, the court held that evidence of price publication by some of the petitioners, plus evidence of parallel pricing, "is sufficient to support a reasonable and permissible inference of agreement" among all petitioners. *Id.* That was a *non sequitur* (and doubly so as to those petitioners who did not even engage in price publication). The Ninth Circuit itself recognized that the prompt public dissemination of previously determined price increases was entirely consistent with each petitioner's independent self-interest. *Id.* at 28a-29a. The Ninth Circuit's concern that public disclosure of prices could facilitate price parallelism has nothing whatever to do with whether there was sufficient evidence to permit a jury to infer an *agreement*, even among those petitioners who did publicly disclose price changes. *A fortiori*, the court's concern was not rationally supportive of an inference of agreement among all petitioners, price publishers and non-publishers alike.

Before a case such as this goes to a jury, there must be additional evidence, beyond mere prompt public disclosure of price increases, that "tends to exclude the possibility" that petitioners acted unilaterally, *Matsushita*, 475 U.S. at 588; and, as the district court determined, there was none. Although it reviewed evidence that some of the petitioners contacted one another to verify already accomplished price changes, App. A at 33a-45a, the Ninth Circuit seemingly agreed that the price verifications that occurred within the period of limitations were "too 'anecdotal' and fragmentary to support a broad inference of conspiracy of the sort alleged here." *Id.* at 42a. The court reasoned, however, that the more frequent contacts that occurred before 1969 (and outside the period of limitations) could be relevant to petitioners' subsequent "intent and motive in publicizing, through press releases and postings, their . . . prices." *Id.* at 35a. But that reasoning logically leads nowhere. The presumed motive—*ie.*, "of quickly informing competitors of the price change, in the express hope that these competitors would follow the move," *id.* at 24a—was precisely the "independent consideration[] of self-interest" which the court had acknowledged to be fully consistent with independent action. App. A at 28a. That presumed motive in no way constituted probative evidence of conspiracy.

The Ninth Circuit nonetheless concluded that "[a]n inference that the parallel [*sic*] use of the trade press was the result of at least a tacit agreement is reasonable," based upon its speculation that such use is "*arguably a substitute* for . . . [the pre-1969] direct competitor contacts." *Id.* at 26a n.12 (emphasis added). That was sheer bootstrapping; *any* action taken by a seller to announce its price to customers and the public could arguably "substitute" for direct competitor contacts, but such speculation obviously does not supply the evidence of agreement needed to satisfy the *Matsushita* test. (The only additional evidence relied upon by the Ninth Circuit

consisted of hearsay testimony relating to separate and isolated contacts between two petitioners and certain independent gasoline marketers—testimony that the court held could be admitted against other petitioners, but only because of the court's earlier determination that the evidence of parallel pricing and price publication itself was sufficient to support a finding of conspiracy. *See id.* at 45a-54a.)

Although it purported to leave the issue for resolution by a jury, the Ninth Circuit nowhere explained by what mental process a jury could reasonably find it more probable than not that companies choosing to publish their already determined prices do so pursuant to an unlawful agreement. Nor did it explain how a trial court is to instruct a jury on the law governing this issue. The Ninth Circuit's own reasoning had nothing to do with factual inferences of an actual *agreement* to publish prices; the court pointed to nothing in the record that would allow a jury to infer anything from the use of a facilitating practice (if that is, indeed, what price publication is) except that the practice facilitated lawful parallel pricing.

Until the decision below, no court ever had held that section 1 of the Sherman Act could be used to proscribe the public dissemination of unilaterally determined prices. To the contrary, it has long been recognized that "the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to . . . prices in actual sales." *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582-84 (1925). Furthermore, the Court in *Sugar Institute v. United States*, 297 U.S. 553, 601, 603-04 (1936), while condemning an agreement among sellers to adhere to published prices, approved the practice of making public announcements of price changes in advance of their effective date. In *Catalano* the Court again pointed out that "there is a plain distinction between the lawful right to publish prices and the terms of sale, on the one hand, and

an agreement among competitors limiting action with respect to the published prices, on the other." 446 U.S. at 649-50. Indeed, the Second Circuit has held that unilaterally adopted practices, including public price announcements, that facilitate interdependent parallel pricing do not fall even within the broader prohibition of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (which, unlike section 1 of the Sherman Act, does not require proof of agreement). *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984).

In the final analysis, the Ninth Circuit has misused section 1 of the Sherman Act to attack a perceived problem that is not within that statute's ambit. Professor Areeda, on whom the Ninth Circuit purported to rely, "reject[s] the notion that unilaterally adopted facilitating practices transform otherwise lawful parallel pricing into illegal conspiracy." VI P. Areeda, *Antitrust Law* ¶ 1436 at 238 (1986). If it is true, as the Ninth Circuit believes, that such "facilitating practices" are not competitively desirable, that is a matter Congress might address through legislation specifically tailored to the problem. *See id.* at ¶¶ 1435, 1436. But in no event does a court's assessment of the competitive worthiness of such conduct furnish an evidentiary basis for a jury to infer an *agreement* to fix prices. The Ninth Circuit's holding that such a judicial assessment, without more, is a sufficient basis for permitting a finding of conspiracy ignores section 1's basic requirement of concerted action and thereby invites juries to misapply that statute.

As the Solicitor General has noted in other similar cases, permitting plaintiffs to go to trial on allegations of conscious parallelism poses the substantial danger that juries will be misled into condemning innocent unilateral conduct that manifests only the competitive workings of an interdependent market:

> Evidence of parallel pricing behavior may mislead a jury possessing little sophistication concerning the operation of economic markets. Indeed the danger of the jury's being misled may be the greatest when the evidence intuitively seems to indicate collusion—for example, evidence of a virtually simultaneous, identical price increase. What to the untrained observer bears the most obvious marks of agreement may, in fact, be perfectly consistent with competitive market performance. Consequently, we believe that it is necessary for district courts to be vigilant to assure that illegality is not ascribed to parallel behavior that manifests nothing more than the workings of a competitive market. *If the plaintiff relies solely on consciously parallel behavior and does not tender additional evidence to show that such behavior differs from that which would be expected under competitive conditions, his complaint should be dismissed on motion for summary judgment.*

Brief for the United States at 9, *Weyerhauser Co. v. Lyman Lamb Co.* (U.S.) (No. 81-1618), *cert. dismissed*, 462 U.S. 1125 (1938) (emphasis added). *See also* Brief for the United States at 6-8, *Matsushita* (No. 83-2004). Respondents here have not shown that petitioners' behavior "differ[ed] from that which 'would be expected under competitive conditions." The Ninth Circuit's holding that respondents need not make such a showing—a holding that has ramifications for all industries that are marked by parallel pricing—raises an issue of paramount importance to the proper interpretation and scope of the Sherman Act.

III. THE DECISION BELOW EFFECTIVELY INVITES JURIES TO FIND SELLERS STRICTLY LIABLE FOR PRODUCT SHORTAGES

In its treatment of respondents' allegation of a conspiracy to create a shortage of gasoline, the Ninth Circuit effectively relieved respondents of any need to present evidence of actual agreement. The court found it suffi-

cient to conclude, based on evidence of various ordinary business practices that it never suggested were not fully consistent with the individual self-interest of each petitioner, that an inference of conspiracy was "plausible," App. A at 60a—without ever once asking whether the competing inference of noncollusive action was equally or more plausible.

Respondents relied upon evidence allegedly supporting four principal conclusions (in addition to the fact of shortage itself):

(1) that in the early 1970s some of the petitioners individually had "tak[en] steps to reduce excess capacity," *id.*—conduct that obviously has no tendency to exclude independent action;

(2) that internal memoranda indicated several of the petitioners individually were aware that excess supply can depress prices and took that into account when evaluating whether and to what extent capacity should be expanded, *id.* at 55a-56a—conduct that, although described by the court as evidencing an "anticompetitive intent," *id.* at 61a, merely reflects petitioners' understanding of the basic law of supply and demand;

(3) that some petitioners had published or obtained long-term forecasts of aggregate supply and demand—conduct from which, as the Ninth Circuit explicitly recognized, "an inference of conspiracy could not permissibly be drawn," *id.* at 61a, because widespread dissemination of such forecasts improves market efficiency and serves the self-interest of "a number of actors in the economy," *id.* at 62a n.23; and

(4) that some petitioners had participated in setting output levels for lawful foreign production joint ventures of which they were members—conduct that the court recognized, standing alone, could not plausibly be construed as part of a conspiracy to create a domestic shortage of gasoline. *Id.* at 64a.

Despite the lack of any evidence probative of conspiracy (and, indeed, the lack of evidence of any actual reduction in capacity), the Ninth Circuit held that because a shortage in fact had occurred, a conspiracy to "facilitate mutual decelerations of increases in production capacity," *id.* at 61a, could permissibly be inferred from the ordinary and lawful business conduct to which respondents had pointed.

The Ninth Circuit did not consider, as it was required to do under *Matsushita*, whether the evidence was as consistent with independent action as with conspiracy. This failure was deliberate: the court expressly disavowed any responsibility for evaluating the evidence in accordance with that standard, asserting that "it is not our task to decide whether we think that an inference of innocent conduct is more plausible than an inference of conspiracy." *Id.* It was enough, the Ninth Circuit believed, that respondents "have offered a plausible conspiracy theory," *id.* at 60a, and that the court itself could "conceive of no significant procompetitive behavior that will be deterred by permitting an inference of conspiracy." *Id.* at 61a. Once again, the court gave short shrift to the requirement of actual agreement.

By resting on the notion that it is sufficient for a plaintiff to assert a "plausible" theory of conspiracy, irrespective of the strength of the opposing inference of independent action, the Ninth Circuit effectively invites juries to find sellers strictly liable for product shortages under section 1. This is, in reality, what respondents sought when they argued in the district court that "it makes no difference whether any less than maximum production . . . stemmed from an antitrust conspiracy to create a shortage or occurred simply because [petitioners] guessed wrong as to their needs" and consequently "did not produce the output necessary." App. B at 92a.

The veneer of evidence with which respondents have sought to clothe this naked claim does not satisfy the

Matsushita test. In the real world of the marketplace, sellers always worry about "overcapacity," "oversupply," and "low" prices, and buyers are concerned with perceived "shortages" and "high" prices. In every industry in which a shortage actually does develop, sellers will have individually considered, as petitioners did here, the risks and benefits of expanding capacity, will have made or attempted to obtain forecasts of industry-wide supply and demand, and will have failed, in the aggregate, to expand capacity to the extent that buyers, with the benefit of hindsight, would have preferred. These ordinary and everyday truths of the marketplace are at least as consistent with independent action as with antitrust conspiracy; they plainly do not justify subjecting sellers to trial and the threat of treble damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6776
MDL Docket No. 150-WPG

IN RE COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

No. 86-6779
USDC No. CV-76-3247-WPG

STATE OF ARIZONA,
Plaintiff-Appellant,

v.

STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; MOBIL OIL CORP.; and SHELL OIL CO.,
Defendants-Appellees,

and

CONTINENTAL OIL CO.; GULF OIL CORP.; PHILLIPS PETROLEUM CO.; CARIBOU FOUR CORNERS, INC.; and POWERINE OIL CO.,
Defendants.

No. 86-6780
USDC No. CV-76-2839-WPG

STATE OF CALIFORNIA,
Plaintiff-Appellant,
v.

STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; EXXON CORP.; GULF OIL CORP.; MOBIL OIL CORP.; and SHELL OIL CO.,
Defendants-Appellees,

and

ATLANTIC RICHFIELD CO.; GETTY OIL CO.; and PHILLIPS PETROLEUM CO.,
Defendants.

No. 86-6783
USDC No. CV-77-0615-WPG

STATE of OREGON, on behalf of itself, its residents and all political subdivisions within the State similarly situated,
Plaintiff-Appellant,
v.

STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; MOBIL OIL CORP.; and SHELL OIL CO.,
Defendants-Appellees,

and

GETTY OIL CO.; GULF OIL CORP.; and PHILLIPS PETROLEUM CO.,
Defendants.

No. 86-6784
USDC No. CV-77-3487-WPG

STATE of WASHINGTON, on behalf of itself and its public entities and residents,
Plaintiff-Appellant,

v.

STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; GULF OIL CORP.; MOBIL OIL CORP.; SHELL OIL CO.,
Defendants-Appellees,

and

GETTY OIL CO.; and PHILLIPS PETROLEUM CO.,
Defendants.

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted: July 15, 1988
Pasadena, California

OPINION

[Filed Jan. 22, 1990]

Before: WALLACE, NELSON, and REINHARDT, Circuit Judges.

Opinion by Judge Nelson

NELSON, Circuit Judge:

The States of Arizona, California, Oregon, and Washington appeal from the district court's grant of summary judgment to the defendants in these consolidated antitrust actions. For the reasons stated below, we reverse the judgment of the district court and remand for further proceedings.

I. INTRODUCTION

Between June 1975 and August 1977, the plaintiffs filed their complaints in these actions, alleging several violations of the Sherman Act, 15 U.S.C. § 1 *et seq.* As developed during the subsequent pretrial proceedings, the plaintiffs' allegations fall into three categories. First, the plaintiffs allege that the defendant oil companies conspired to raise or stabilize prices for refined oil products in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The plaintiffs assert that, in furtherance of this conspiracy, the defendants continually engaged in the mutual exchange of pricing and price-related information. Second, the plaintiffs allege that the defendants conspired to create, by various means, an artificial scarcity of crude oil and refined oil products in the western United States, in violation of §§ 1 & 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. Third, the plaintiffs allege that the defendants conspired not to compete in bidding on the plaintiffs' annual bulk sale petroleum supply contracts, in violation of § 1 of the Sherman Act.

After several years of extensive discovery, the plaintiffs filed in January 1983 a three volume pretrial brief ("Plaintiffs' Initial Pretrial Brief" or "PIPB"), setting out their analysis of what the evidence would prove. The PIPB was supplemented on several occasions. In July 1983, the defendants moved for summary judgment, asserting that the evidence as summarized in the PIPB

failed to raise a triable issue of antitrust conspiracy. After three days of oral argument on the summary judgment motions, the district court took the matter under submission. On November 25, 1986, the court filed an opinion and order granting the defendants' summary judgment motion in its entirety. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 656 F. Supp. 1296 (C.D. Cal. 1986) [hereinafter *Petroleum Prods.*]. The plaintiffs have timely appealed.

Before turning to an analysis of the proper summary judgment standards and their application in this case, we think it appropriate and useful first to outline certain background facts concerning the industry's structure as well as the nature of appellants' theory concerning the operation of the alleged conspiracy.

The appellees are major oil companies which, among other activities, produce crude oil, refine it into gasoline, and sell the gasoline to various distributors. During the time periods relevant to this appeal, these distributors fell into roughly four classes: (1) independent service station owners who operated franchises selling one particular brand of gasoline; (2) company-owned service stations run by company employees; (3) independent "jobbers" or brokers who resold gasoline to various service stations and other purchasers; and (4) governmental entities and others who purchased under bulk sales contracts. All parties agree that the lion's share of appellees' gasoline that was sold at retail was sold by independent franchised service stations.

As franchisees, these "independent" dealers were not free to purchase their supply of gasoline from any oil company at any time; as long as they remained franchisees they could only purchase from their particular franchisor. Each company sold gasoline to its franchised dealers at a price known as the "dealer tankwagon price." In actuality, the official tankwagon prices were only occasionally changed; fluctuations in the cost of gasoline to

franchised dealers were more frequently reflected in changes to the applicable discounts from the tankwagon price. These discounts were variously known as "temporary dealer assistance," "dealer aid," or simply "discounts."

The appellants argue that, as a consequence of this market structure, each oil company was effectively able to control the retail price at which its gasoline was sold. That is, the appellants claim that, although individual dealers "showed varying degrees of independence," an oil company could essentially determine the retail price by setting the applicable discount from the tankwagon price at which it sold gasoline to its franchised dealers.

In the present actions, the appellants claim that the appellees have engaged in a conspiracy to raise and stabilize the retail price of gasoline at the pump. They do not claim, however, that the appellees engaged in a resale price maintenance scheme whereby each dealer was required to charge a predetermined price; indeed, they have expressly disavowed such a theory. Rather, the appellants claim that the appellees conspired to fix retail prices by coordinating dealer discounts from the tankwagon price.

The parties hotly contest on appeal whether the application of this theory is limited by the Supreme Court's decision in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), which held that indirect purchasers of goods whose price was fixed earlier in the stream of commerce may not maintain an antitrust damages action for overcharges passed on to them by those who purchase directly from the pricefixers. Although the district court had earlier ruled that *Illinois Brick* limited the relief available to the plaintiffs, *see In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 497 F. Supp. 218, 225-27 (C.D. Cal. 1980), *aff'd on other grounds*, 691 F.2d 1335 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984), it nonetheless recognized that *Illinois Brick* did

not completely bar recovery. Accordingly, in ruling on the summary judgment motion, the district court recognized that, despite the ruling that *Illinois Brick* limited the relief that was available, the plaintiffs would still be able to receive some relief if they could establish that the defendants conspired to fix retail prices by fixing wholesale prices. *See Petroleum Prods.*, 656 F. Supp. at 1299 (noting that plaintiffs' theory was that the defendants conspiratorily eliminated dealer discounts, thus "restoring" the official tankwagon prices, in order to fix retail prices). For purposes of this appeal, we operate with this same premise. Accordingly, we have no occasion to consider whether the district court was correct in its earlier ruling concerning the applicability of *Illinois Brick*.

II. SUMMARY JUDGMENT STANDARDS

We review de novo the district court's grant of summary judgment to the defendants. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987).

Determining whether the grant of summary judgment was proper in this case involves a careful application of the standards set down by the Supreme Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Because the parties sharply disagree over the proper interpretation of *Matsushita*, and because the issue is crucial to a proper resolution of this case, we think it appropriate to review in some detail the nature of the standards established in *Matsushita*.

A. The Matsushita Decision

In *Matsushita*, plaintiffs Zenith and National Union Electric Corp. ("Zenith") sued several Japanese companies that manufacture consumer electronic products. Zenith alleged that the Japanese companies had engaged in a predatory pricing conspiracy aimed at driving American firms from the U.S. consumer electronic prod-

ucts market. After several years of discovery, the defendants moved for summary judgment. The district court granted the defendants' motion, concluding that any inference of conspiracy was unreasonable. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). The Third Circuit reversed as to 21 of the 24 defendants, concluding that the plaintiffs had presented sufficient evidence to permit a reasonable factfinder to infer that the defendants had engaged in a predatory pricing conspiracy. *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 304-11 (3d Cir. 1983).

The Supreme Court reversed this decision because it concluded that the evidence proffered by the plaintiffs did not provide any basis for concluding that the alleged predatory pricing was rational; in the Court's words, the defendants simply "had no rational economic motive to conspire." *Matsushita*, 475 U.S. at 596. This fact, combined with the evidence that the defendants' conduct was "consistent with other, equally plausible [innocent] explanations" implied that the defendants' conduct could "not give rise to an inference of conspiracy." *Id.* at 596-97. Moreover, the Court stated that, even if the defendants had had a rational economic motive to conspire, summary judgment would still have been appropriate in light of the fact that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Id.* at 597 n.21 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984)). In such circumstances, the plaintiff must come forward with "sufficiently unambiguous" evidence " 'that tends to exclude the possibility' " that the defendants were acting lawfully. *Id.* at 588, 597 (quoting *Monsanto*, 465 U.S. at 764).

We do not take these latter comments as suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that

inferences of conspiracy and inferences of innocent conduct are equally plausible. Allowing the district court to make that decision would lead to a dramatic judicial encroachment on the province of the jury. To read *Matsushita* as requiring judges to ask whether the circumstantial evidence is more "consistent" with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference. This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.

Indeed, under this interpretation of *Matsushita*, a trial judge would not even need to evaluate whether the inference of conspiracy meets a threshold standard of reasonableness, which is the usual standard for judging inferences on summary judgment. *See Batchelor v. Oak Hill Medical Group*, 870 F.2d 1446, 1447 (9th Cir. 1989). Since any inference that the trial judge thinks is more plausible than its alternatives must necessarily be a reasonable one, the trial judge would only need to ask whether he thinks the inference of conspiracy is the more plausible one. This cannot be what the Supreme Court meant when it stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. The Court purported to *limit* the application of the traditional summary judgment rules in the antitrust context; it did not intend to abolish them and replace them with an entirely different set, one which raises troubling seventh amendment concerns. *Cf. Standard Oil v. Arizona*, 738 F.2d 1021 (9th Cir. 1984) (holding, in a prior appeal in this case, that the seventh amendment guarantees a right to jury trial in antitrust cases), *cert. denied*, 469 U.S. 1132 (1985). Indeed, the Court noted that, within the limits imposed by antitrust law, it remained true that " '[o]n

summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita*, 475 U.S. at 587-88 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case. After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences. *See United States v. Henderson*, 693 F.2d 1028, 1031 (11th Cir. 1982) ("[C]ircumstantial evidence is not testimony to the specific fact being asserted, but testimony to other facts and circumstances from which the jury may infer that the fact being asserted does or does not exist."). Thus, such an interpretation of *Matsushita* would seem to be tantamount to requiring direct evidence of conspiracy. This cannot be what the Court meant in *Matsushita*. Since direct evidence will rarely be available, such a reading would seriously undercut the effectiveness of the antitrust laws. Furthermore, *Monsanto* itself clearly indicates that circumstantial evidence may be sufficiently unambiguous to survive summary judgment. *Monsanto*, 465 U.S. at 764 (plaintiff must "present direct or *circumstantial* evidence" that reasonably tends to prove that the defendants were engaged in a conspiracy rather than acting independently) (emphasis added); *see also Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 485 (9th Cir. 1988) (circumstantial evidence found to be sufficiently unambiguous under *Monsanto*), *cert. denied*, 109 S. Ct. 817 (1989).

We think that the key to the proper interpretation of *Matsushita* lies in the Court's emphasis on the dangers

of permitting inferences from certain types of ambiguous evidence. In *Matsushita*, the Court was unwilling to permit an inference of predatory pricing in part because the Court was concerned about the inference's possible anticompetitive side-effects. The Court noted that the plaintiffs attempted to prove an antitrust conspiracy "through evidence of rebates and other price-cutting activities." 475 U.S. at 594. However, as the Court went on to observe,

> [C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto*, [465 U.S.] at 763-764. '[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'"

Id. (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)).

Thus, *Matsushita* establishes that a trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct. We emphasize, however, that an antitrust defendant is not entitled to summary judgment simply by virtue of the fact that the plaintiff's inference of conspiracy would have *some* deterrent effects; the effects must be significant. As the Court stated in *Matsushita*, the concern with avoiding deterrent effects "must be balanced against the desire that illegal conspiracies be identified and punished." 475 U.S. at 594. In short, the trial court must consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, "sufficiently unambiguous" evi-

dence that does not have these undesirable deterrent effects. *Id.* at 597-98 & n.21.

This reading of *Matsushita* is further supported by examining the Court's decision in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), upon which the *Matsushita* Court relied heavily. In *Monsanto*, plaintiff Spray-Rite alleged that Monsanto had illegally conspired with its other distributors in deciding to terminate Spray-Rite's distributorship. Among the items of evidence introduced in support of this claim was the fact that Monsanto terminated Spray-Rite after receiving complaints from its other distributors about Spray-Rite's price cutting practices. Monsanto, on the other hand, contended that it had acted independently in deciding to terminate Spray-Rite. In analyzing the proper standard of proof for such a claim, the Supreme Court began by noting that, while it is *per se* illegal for a manufacturer to get together with its distributors and agree on prices, *see Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-09 (1911), it is nonetheless permissible for a manufacturer to announce its retail prices in advance and then to terminate those distributors who fail to comply, *see United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). *See Monsanto*, 465 U.S. at 761. In light of these cases, the Court concluded that it could not permit an inference of conspiracy to be drawn from the mere fact that a distributor had been terminated after the manufacturer had received complaints from other distributors about price cutting. The Court reasoned that permitting such an inference would effectively preclude a manufacturer from exercising its independent termination rights under *Colgate* once it received any complaints from its distributors. In the Court's words:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate

> conduct. . . . To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market. In sum, "[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would . . . inhibit management's exercise of its independent business judgment . . . ."

Monsanto, 465 U.S. at 763-64 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)) (other citations omitted).

Monsanto thus clearly illustrates that courts should be careful not to permit inferences of antitrust conspiracy when to do so would create a significant irrational dislocation in the market or would result in significant anticompetitive effects.[1]

In summary, we conclude that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior.

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[1] We should note that the holding of *Monsanto* primarily applies to discussions between the manufacturer and its distributors. Under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), it is clear that a manufacturer can have discretion over whom it wishes to deal with so that it can maintain order in its distribution ranks. As this court stated in *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 632 n.4 (9th Cir. 1987), "a manufacturer's independent refusal to deal with distributors did not violate antitrust laws." But the same rationale does not necessarily apply to relationships among competitor companies, and we note that horizontal relationships among co-competitors, such as those which exist in this case, are distinguishable from vertical relationships between a manufacturer and its distributors.

Once the defendant has made such a showing, the plaintiff must come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully.

B. Direct v. Circumstantial Evidence

Before turning to the specific issues of this case, we must add one further comment with regard to the applicability of *Matsushita*. As the above analysis demonstrates, the concerns highlighted in *Matsushita* and *Monsanto* arise only in the context of whether to permit inferences from circumstantial evidence. Accordingly, the *Matsushita* standards do not apply when the plaintiff has offered direct evidence of conspiracy.

This important limitation on the applicability of *Matsushita* was emphasized in our decision in *McLaughlin v. Liu*, 849 F.2d 1205 (9th Cir. 1988). In *Liu*, the Secretary of Labor argued that summary judgment was properly granted, under *Matsushita*, on the grounds that the defendant's sworn affidavit—which, if believed, would have provided a complete defense as to part of the Secretary's claim—was "implausible." *Id.* at 1207. We emphatically rejected this argument, noting that in *Matsushita*, "the Court was not speaking of direct evidence, but of circumstantial evidence." *Id.* We noted the important difference between circumstantial evidence, in which a party asks that certain "inferences be drawn in his favor" and direct evidence, where, in order to defeat a request for summary judgment, the nonmovant need only ask that his evidence "be taken as true." *Id.* at 1208. We emphasized that the cases of both the Supreme Court and this court "have honored the difference between weighing direct evidence and refusing to draw unreasonable inferences from circumstantial evidence." *Id.* We summarized our cases as indicating that *Matsushita* only applies "where the non-movant relie[s] on inferences from circumstantial evidence." *Id.* We then went on to

quote extensively from *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626 (9th Cir. 1987), highlighting that the *Matsushita* inquiry was appropriate only "'[*w*]*here there is no direct evidence of a conspiracy.*'" *Id.* at 1209 (quoting *T.W. Elec.*, 809 F.2d at 632) (emphasis added by *Liu*). *See also Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 n.4 (9th Cir. 1988) (standards spelled out in *T.W. Elec.* apply only "[i]f there is no direct evidence of a conspiracy").

Thus, in applying *Matsushita*, a court must consider the nature of the evidence that the plaintiffs have offered with respect to each element of the cause of action. If the plaintiffs rely exclusively on circumstantial evidence in order to establish at least one element of their cause of action, then the court must proceed to analyze, under *Matsushita*, whether the inferences which the plaintiffs seek to draw from the indirect evidence are reasonable and permissible under the governing substantive law. *T.W. Elec.*, 809 F.2d at 631; *see also United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.) (en banc), *cert. denied*, 110 S. Ct. 51 (1989). In the antitrust field, this inquiry will be guided by the principles outlined earlier. If, however, the plaintiffs offer direct evidence to support each element, then summary judgment must be denied.

III. APPELLANTS' PRICE-FIXING CLAIMS

In their briefs to this court, the appellants have identified three classes of evidence that they claim create a genuine issue of material fact as to whether the appellees were engaged in a conspiracy to fix or stabilize prices. For purposes of analysis, we will first examine these classes of evidence successively; having done so, we will then be in a better position to evaluate the probative value of the entirety of the appellants' evidence.

A. Pricing Pattern Evidence

The first set of evidence that the appellants claim indicates the existence of a conspiracy is a set of analyses of the appellees' pricing patterns.[2] This analysis was performed by appellants' expert Keith Leffler. The raw data which Mr. Leffler analyzed were derived, in large measure, from pricing information collected by Lundberg Surveys, Inc. During the period from 1968 to 1973, the Lundberg firm collected, on a weekly basis, retail price information from individual stations in 14 different cities in Arizona, California, Oregon, and Washington. Mr. Leffler analyzed this data for the largest city in each of the four states. His analysis of this weekly data indicates that, between 1968 and August 1972, the average retail prices of stations selling appellees' gasoline in the Los Angeles, Phoenix, Portland, and Seattle markets generally followed a "sawtooth" pattern. That is, the average prices would generally decline over a period of time ranging from approximately three to eleven weeks, and then the prices would return to roughly their original, higher levels over approximately a one to four week period. Both the price increases and decreases from week to week were often quite sharp; but the increases were often especially sharp.

The parties do not seriously dispute that the sharp increases in retail prices were generally the consequence

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[2] In first considering the parallel pricing evidence alone we do not ignore our mandate to "take special caution to give the [plaintiffs] 'the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.'" *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 526 (9th Cir. 1987) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)); *see also City of Long Beach v. Standard Oil Co.*, 872 F.2d 1401, 1404-05 (9th Cir.), *amended*, 886 F.2d 246 (1989), *cert. denied*, 110 S. Ct. 1126 (1990). Thus, later in sections III-B and III-C we will consider appellants' claim that appellees exchanged various information to facilitate price coordination in the context of the parallel pricing evidence.

of the withdrawal of dealer discounts, thus resulting in the "restoration" of the "normal" higher dealer tankwagon prices.[3] Accordingly, we cannot accept the district court's conclusion that the cyclical pattern of retail prices does not suggest that wholesale prices followed a similar pattern. *See Petroleum Prods.*, 656 F. Supp. at 1300 ("the cycle of retail price changes reflected by the charts does not establish that the defendants' wholesale prices followed the same pattern").[4] Indeed, we note that the data presented by the appellees themselves concerning their wholesale prices indicates that the pattern of these prices was a cyclical one of sharp increases followed by gradual declines. The key disagreement between the parties concerns the significance of this pattern. The appellees argue that the restorations and the sawtooth pattern of prices do not indicate conspiracy because the same pattern would be produced by individual companies each deciding to follow the others' price lead. In short, the appellees essentially assert that their pricing behavior was interdependent rather than conspiratorial.[5] The appellants disagree, arguing that these

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[3] We note, however, that the parties sharply disagree over whether this correlation indicates sufficient "control" of the dealers to avoid the holding of *Illinois Brick*. Nonetheless, as stated earlier, we do not reach this issue. In analyzing the significance of the retail pricing data, we think it sufficient to note that, regardless of the specific degree of control over individual stations, movements in the appellees' wholesale prices generally influenced the retail prices that were charged by the dealers. The parties do not dispute this latter fact.

[4] Curiously, the district court later went on to state, in apparent contradiction, that "[w]holesale prices play a major part in any decision to set retail prices, and we therefore can assume that the defendants' wholesale prices had a tendency to follow a similar pattern"). 656 F. Supp. at 1300. We agree with this latter statement of the district court.

[5] As used here, the term "interdependent" merely describes the phenomenon of sequential competitive pricing decisions that are each made (1) in response to the ones preceding it and (2) in hope

price cycles were not the result of any sort of independent action, but are rather an indication of collusion. The appellants assert that a conspiracy may be inferred from this pricing data because the price increases were too large and too risky to have occurred in a competitive market. According to the appellants, any company that raised its prices this sharply would so risk losing business that it would never take such a step without some advance assurance that others would follow. Therefore, argue the appellants, the fact that such price increases were made is an indication of a prior agreement to raise prices.

In applying *Matsushita*, our first task is to decide whether the appellees' claim of interdependent pricing constitutes a sufficiently plausible independent explanation for their pricing behavior. The appellants' key argument on this score is that the price increases were so risky that it is implausible to believe that any firm would have undertaken them without some advance agreement from competitors. We note that such an argument may often be valid when the relevant market is highly unconcentrated or where the increase cannot be reversed easily or readily without substantial loss of goodwill. *See* VI P. Areeda, *Antitrust Law* ¶ 1425d at 150-53, ¶ 1431a at 183-84 (1986). In a highly unconcentrated market, any firm that attempted a unilateral supracompetitive price increase would quickly lose business to its many other competitors. Interdependent pricing is not likely to occur because each firm realizes that the possibility of undetected "shading" of the interdependent price by a single firm would quickly lead to a return to the original market price. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 659-60 (1962); *see also* VI P. Areeda, supra, at ¶ 1429a.

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or expectation of the ones that follow it. The legal significance of such conduct is analyzed below.

In such a market, any single firm can increase its output without substantially affecting the market price of the market shares of its competitors. This fact substantially increases the odds that shading by an individual firm would either go undetected or be ignored, and the consequent spread of such discounting would rapidly bring the overall price back down. Turner, 75 Harv. L. Rev. at 660; VI P. Areeda, *supra*, at ¶ 1429a. Therefore, without some sort of prior agreement prohibiting such shading, the temptation for any individual firm would be almost irresistible. Turner, 75 Harv. L. Rev. at 660. Accordingly, in highly unconcentrated markets, a claim that price increases were the result of sequential interdependent price increases is often likely to prove implausible.

However, as the number of firms in a market declines, the possibility for interdependent pricing increase substantially. In determining whether to follow a unilateral price increase by a competitor, a firm in a relatively concentrated market will recognize that, because its pricing and output decisions have an effect on market conditions and will generally be watched by its competitors, there is less likelihood that any shading would go undetected or would be ignored. The firm thus knows that if it fails to follow the price lead, the leading firm will quickly reduce its prices back to their earlier level. VI P. Areeda, *supra*, at ¶ 1429b. On the other hand, the firm may recognize that the higher price is one that would produce higher profits. It may therefore decide to follow the price increase, knowing that the other firms will likely see things the same way and that, at any rate, any subsequent downward movement in prices would likely be detected before there was any substantial loss of market share. *Id.;* Turner, 75 Harv. L. Rev. at 661-62.

There has been a considerable debate in the literature over whether interdependent pricing is an inevitable or

inherent feature of certain types of concentrated markets. *Compare* VI P. Areeda, *supra*, at ¶¶ 1430-32 (inherent); Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 Cal. L. Rev. 835, 858-59 (1987); Turner, 75 Harv. L. Rev. at 665-66 *with* R. Posner, *Antitrust Law: An Economic Perspective* 42-47 (1976) (not inherent); Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1566-75 (1969). We need not take any side in this debate.[6] Regardless of whether such conduct is an inevitable consequence of a more concentrated market structure, we conclude that it is at least plausible to assert that such pricing behavior *can* occur when the number of significant rivals in a market is sufficiently small.

We do not think that the number of significant firms in the gasoline markets involved in this case is so large as to render the possibility of sequential interdependent price increases wholly implausible. Although these markets would probably not be considered highly concentrated in Herfindahl-Hirschmann terms, that does not imply that the appellees' claim of interdependent pricing is implausible. VI P. Areeda, *supra*, ¶ 1431a at 183 (noting that the Herfindahl-Hirschmann Index "cannot capture the full range of factors bearing upon the existence or strength of recognized interdependence"). As Professor Areeda has noted, "All one can say with assurance is that such interdependence and price coordination are implausible when there are 'many' 'significant' rivals (more than a dozen?) but more likely as the number of firms decreases." *Id.* at 184. The gasoline

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[6] Were it necessary to do so, we would be hard-pressed to conclude that interdependent pricing is "inevitable" or "inherent" in the gasoline markets at issue in this case. Given the generally rapid deterioration in prices that followed each restoration, any interdependence in the appellees' pricing behavior was at best imperfect.

markets under discussion here appear to lie in that gray area where, although not altogether inevitable, interdependence is distinctly possible. *See* F. Scherer, *Industrial Market Structure and Economic Performance* 288 (2d ed. 1980) (discussing empirical evidence of interdependent pricing in the gasoline industry). Indeed, the appellants have not pointed to any evidence indicating that the number of firms in these markets is too large for interdependence to occur.

Nonethless, we noted earlier that, even in highly concentrated markets, a unilateral price hike might be too risky to make without advance agreement if the increase could not be readily reversed without a significant loss of goodwill. On the other hand, where a unilateral price increase can be withdrawn quickly, a firm may very well decide to test the waters without any sort of advance commitment from its competitors as to whether they will follow. In this regard, we note that the uncontested record evidence indicates that unilateral price increases in these markets were quickly reversible.[7] Furthermore, the evidence indicates that, although unilateral restorations could often entail significant costs if unsuccessful, the costs do not appear to have been so prohibitive as to suggest that the possibility of such unilateral action was implausible.[8]

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[7] Thus, for example, the record indicates that in mid-February 1971, Union "restored" prices to its dealers in California by withdrawing dealer discounts, but when only two other companies followed suit, it reinstated dealer aid just a few days later.

[8] In reaching this conclusion, we take note of the fact that the record indicates that the appellees generally learned quite rapidly of one another's price moves by reading about them in the trade press. In section III-B, *infra*, we consider the appellants' claim that the appellees' exchange of information through the trade press is, under the circumstances of this case, probative of a conspiracy. For purposes of the present analysis, however, we take a rapid dissemination of such pricing information as a given.

We recognize that such interdependent pricing may often produce economic consequences that are comparable to those of classic cartels. Nonethless, proof of such pricing, *standing alone*, is generally considered insufficient to establish a violation of the Sherman Act. *See Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 526 (9th Cir. 1977) ("[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.") (quoting *United States v. International Harvester Co.*, 274 U.S. 693, 708-09 (1927)); *see also Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 789 (1989); *Apex Oil v. DiMauro*, 822 F.2d 246, 253-54 (2d Cir.), *cert. denied*, 108 S. Ct. 489 (1987); *E.I. DuPont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 129 (2d Cir. 1984) ("The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws."); VI P. Areeda, *supra*, at ¶ 1432; Turner, 75 Harv. L. Rev. at 669-72. Additional proof beyond mere parallel pricing usually is required.[9]

Our discussion of *Matsushita* highlights the wisdom of this rule. In applying the second prong of the *Matsushita* test, we must ask whether, given the possibly interdependent nature of the pricing behavior observed in this case, permitting a § 1 violation to be found *solely* on such evidence would have the effect of deterring important legitimate conduct. We conclude that, if we were required to decide based on the price cycle evidence standing alone, we would find that it would not be enough to survive summary judgment. To permit an antitrust violation to be based on the sawtooth price pattern in this

[9] In some cases, when a market is highly unconcentrated, parallel pricing alone may be all the proof that is required.

case, without more, would require a company making wholly independent pricing decisions to consider that the possible responses of its competitors might render it liable for treble damages. Similarly, following another company's price increase might very well provide the evidence that a disgruntled customer would need to get to a jury in a treble damage antitrust suit. It thus appears that permitting an inference of conspiracy from the parallel pricing evidence alone would result in an anticompetitive dislocation by distorting independent pricing decisions.

We also cannot agree that, without more, the conspiratorial nature of the price restorations is indicated by the fact that the price hikes were "too high." Were we to permit such a theory, few pricing decisions would be immune from antitrust scrutiny. Any unhappy buyer in a market experiencing a general increase in prices could bring an antitrust action against the sellers, arguing that the conspiratorial nature of the price increase is indicated by the fact that the increase was "too high." The court would then be required to receive evidence as to the wisdom of, and necessity for, the price increase, and to judge what constitutes a "fair" price. The federal courts generally are unsuited to act as rate-setting commissions. *See* VI P. Areeda ¶ 1432 at 203. Accordingly, the appellants must rely on additional evidence beyond mere price parallelism in order to avoid summary judgment.

B. Price Data Dissemination Evidence

The appellants point to two additional classes of evidence which they claim indicate the existence of a conspiracy to fix or stabilize prices. The first of these two sets consists of evidence concerning various practices whereby the appellees disseminated information concerning their wholesale and retail prices. The appellants contend that, not only were these price dissemination prac-

tices themselves conspiratorily and unlawfully adopted, but that they were adopted pursuant to an agreement or understanding to engage in concerted restorations. The appellees argue that these practices were both lawful and independently adopted and that they are not probative of a conspiracy to stabilize prices.

1. *Press releases*

The appellants presented evidence indicating that at various times each of the defendants except ARCO, Union, and Gulf engaged in the practice of publicly announcing, in press releases, their decisions to withdraw dealer assistance and to restore tankwagon prices.[10] Indeed, the evidence indicates that such price increases were sometimes announced in advance of their effective date. Thus, for example, Mobil announced on March 26, 1970 that it would withdraw dealer aid effective March 30. The appellees argue that no inference of conspiracy may be drawn from such evidence because they claim that the publication of this information was "perfectly lawful" and an "ordinary business practice." We conclude, however, that such an inference is both reasonable and permissible under *Matsushita*.

In their depositions in this case, several officers of the appellee oil companies were questioned concerning the business reasons for publicly announcing changes in tankwagon prices and in the levels of dealer assistance. Their virtually uniform response was that it was done for the purpose of quickly informing competitors of the price change, in the express hope that these competitors would follow the move and restore their prices.

Thus, the appellees' officers' own testimony indicates that there was essentially no purpose for publicly an-

[10] The record indicates that in the 1960s Exxon issued press releases concerning its withdrawal of dealer aid, but that it stopped doing so in 1969. Nonetheless, the record also indicates that Exxon continued to respond to press inquiries concerning its price moves.

nouncing tankwagon prices and dealer discount information other than to facilitate either interdependent or plainly collusive price coordination. Announcing such price increases publicly reduced the likelihood that the increase would fail to be detected or that it would be detected only after the price leader had been "hung out to dry" in the market for several days. Without a press release, a withdrawal of dealer support might not be readily detected because the retail prices of individual branded gas stations varied considerably. As one Standard Oil official put it: "[S]treet pricing [was] all over the lot; so to us it was important that we set forth clearly and exactly what we had done so there would be no misunderstanding of it." Indeed, Arco's failure publicly to announce its restoration attempts to the trade press appears to have been responsible for the failure of its January 1970 restoration. An internal Arco memorandum explained that "[t]he reason this partial restoration did not work is that our competitors obviously thought our dealers were merely overpricing and our constructive efforts went completely unnoticed at the market place." To avoid this problem, the memorandum recommended that if Arco decided to lead a restoration in the future, it should be "telegraphed to all news media as far as possible in advance as Legal will approve."

It was important for the appellees to reduce the uncertainties concerning restorations because the costs associated with leading a restoration were significant, and they increased with each day that a move was not detected or was not followed. An internal Arco memorandum noted that its unsuccessful restoration attempts had been "costly to us, not only in terms of volume, but more importantly in expense dollars required to recoup and serious adverse reaction with our customers and in our dealer organization." Another Arco document noted that "[p]ast experience has taught us how disastrous it can be for us to be the leader in an upward move." Even with public announcement, the costs of leading a restora-

tion were substantial; Standard Oil's internal analysis of the effect of three restorations it led indicated an average drop in sales volume of over 19% within one week. The same Standard Oil document blamed, in part, the company's practice of leading restorations for causing a significant decline in Standard's overall market share. An Arco document echoed this view, noting that Standard's and Shell's leading of restorations had led to their "disastrous" loss in market share.

The evidence presented by the appellants thus indicates that the publication of wholesale price increases was intended to make, and had the effect of making, restorations more effective by ensuring that competitors could quickly learn of, and respond to, any withdrawal of dealer aid.[11] The appellees' actions in announcing such information made the market more receptive to price coordination than it otherwise would have been. Although we concluded earlier that mere proof of interdependent pricing, standing alone, may not serve as proof of an antitrust violation, we believe that the evidence concerning the purpose and effect of price announcements, when considered together with the evidence concerning the parallel pattern of price restorations, is sufficient to support a reasonable and permissible inference of an agreement, whether express or tacit, to raise or stabilize prices. The inference is reasonable because at the very least, a jury could conclude that the appellees implicitly agreed to engage in practices that they knew and hoped would lead to greater price coordination,[12] with the result that when

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[11] As noted earlier, the record indicates that price increases were occasionally announced in advance of their effective date. Such announcements are, of course, even more effective in allowing the price leader to communicate its intention and to receive reactions without having to incur substantial risk.

[12] An inference that the parallel use of the trade press was the result of at least a tacit agreement is reasonable in light of the fact that, as noted in section III-C, *infra*, the use of the trade press was arguably a substitute for the direct competitor contacts

a price leader wished to initiate a restoration, it could effectively solicit tacit agreement. *See United States v. Container Corp.*, 393 U.S. 333, 336-37 (1969) (informal agreement to provide price information may, under appropriate market conditions, constitute circumstantial evidence of an agreement to stabilize prices);[13] *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1152 (10th Cir. 1981) (*Container* established that exchange of price information may serve as basis for inferring price fixing where effect of such exchange is to stabilize prices), *cert. denied*, 454 U.S. 1164 (1982); *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1148-49 (8th Cir. 1979) (summary judgment was erroneously granted where evidence indicated possible connection between price information exchanges and alleged conspiracy to fix brokerage fees); *see also* Posner, *Information and Antitrust: Reflections on the* Gypsum *and* Engineers *Decisions*, 67 Geo. L.J. 1187,

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that the appellees admit occurred during the period prior to the Court's decision in *United States v. Container Corp.*, 393 U.S. 333 (1969).

[13] Consistent with the limited nature of the holding in *Container*, the Court has held that agreements to exchange pricing data do not themselves constitute a *per se* violation of the Sherman Act. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). Accordingly, information exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis. Given *Container*'s conclusion that the agreement in that case fell within the *per se* ban against price fixing, *see* 393 U.S. at 337-38 & n.4 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-21 (1940)), it seems clear that *Container* falls into the first of these two classes. *See Wilcox v. First Interstate Bank*, 815 F.2d 522, 526 (9th Cir. 1987) (noting that *Container* involved an agreement to fix prices); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1360 (9th Cir. 1976) (characterizing *Container* as a case in which companies exchanged price information "for the purpose of price stabilization"), *cert. denied*, 429 U.S. 1074 (1977).

1199 (1979) ("[I]f the effect of the information exchange were to raise the level [of] prices, one could infer that the motive was price fixing."); *id.* at 1203 (a jury should be allowed "to consider exchanges of information, other communications among the parties to an alleged conspiracy, and such other relevant circumstances as the effect on the price level . . ., as circumstantial evidence of alleged price fixing.").

We reject the appellees' circular argument that the publication of dealer discount and price information cannot support an inference of conspiracy because the information was "publicly available." The information was publicly available only because the appellees chose to make it so; without such dissemination, price moves were not always readily and easily detected. Furthermore, we agree with Professor (now Judge) Posner that "the *form* of the exchange—whether through a trade association, through private exchange as in *Container*, or through public announcements of price changes—should not be determinative of its legality." R. Posner, *Antitrust Law: An Economic Perspective* 146 (1976). The fact that it is feasible for the appellees to communicate the necessary price information through press releases does not "immunize the exchange of price information from legal sanction [where] the conditions of the market suggest that the exchange promotes collusive rather than competitive pricing." *Id.* at 147.

We do not believe that permitting such an inference poses any problem under *Matsushita*. The district court concluded that the inference could not be permitted, reasoning that the hope of imitation was a proper business purpose for the announcements, and that the publication of such information was in the legitimate individual interest of each company. *Petroleum Prods.*, 656 F. Supp. at 1304-05. We agree that it is plausible to contend that independent considerations of self-interest would have led a company to choose to publish a price increase that

it had decided to make. That does not settle the inquiry, however; the question remains whether permitting an inference of conspiracy from the fact of such publication would significantly deter important legitimate conduct. Given the market conditions present in this case, we conclude that it would not.

It is important to recognize that, given the system of branded franchising, the tankwagon prices or dealer discounts are not of immediate significance to anyone other than the oil companies and their franchised dealers. Retail purchasers do not care what the dealer paid for the oil; they are concerned only with the price at the pump. Moreover, the public dissemination of information concerning dealer tankwagons and discounts could hardly be described as fostering the efficient or rational operation of the market inasmuch as there simply was no wholesale market to rationalize; the branded dealers were not free to shop around for their oil. Accordingly, the district court's reliance on *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582-84 (1925) (noting that certain types of price information exchanges may help to "avoid the waste which inevitably attends the unintelligent conduct of economic enterprise"), *quoted in Petroleum Prods.*, 656 F. Supp. at 1304, is wholly inapposite.

The uncontested record evidence indicates that the dealers were individually notified concerning any changes in the tankwagon price or in the level of dealer discount. In light of this fact, it appears that the public dissemination of such information served little purpose other than to facilitate interdependent or collusive price coordination. Under these circumstances, there is no significant probability that permitting the proffered inference would deter important legitimate conduct.[14] The *Matsushita* balance is particularly one-sided in this case.

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[14] Our conclusion would necessarily be different were the appellants' inference of a price-fixing conspiracy based on the dissemination or advertising of *retail* prices; permitting an inference of con-

Nothing in our earlier discussion concerning mere proof of parallel pricing is to the contrary. Simple interdependent pricing does not violate the Sherman Act, not because it is desirable (it is not), but because permitting proof of conspiracy solely on the basis of price parallelism *is* undesirable. The appellants, however, have offered evidence indicating that the appellees in this case did more than simply price interdependently. A jury could conclude that the oil companies agreed, either implicitly or explicitly, to create market conditions that would facilitate tacit or express price coordination. The evidence would support a conclusion that the appellees strove to make such coordination possible where it otherwise might not have been. To paraphrase Professor Areeda, "One may reluctantly tolerate interdependent pricing behavior as such and still condemn [those agreements involving] practices which unjustifiably facilitate interdependent pricing and which can be readily identified and enjoined." P. Areeda, *Antitrust Analysis* ¶ 325, at 381 (3d ed. 1981). We think that a jury should decide whether the appellees' actions were undertaken pursuant to an agreement or understanding concerning prices or whether their activities were simply noncollusive and independent.[15]

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spiracy from such evidence would make it more difficult for retail consumers to get the information they need to make efficient market decisions. In the district court, the appellants did indeed base their claims in part on the public announcement of retail prices by dealers, but they have not pressed such a theory on appeal.

[15] We also note that, as an alternative to using the price data dissemination evidence as a means of proving the existence of a *per se* illegal conspiracy to fix prices, the appellants on remand may also seek to challenge directly, under a rule of reason analysis, the alleged agreement to exchange price information. *See* note 13 *supra*. Given the evidence indicating a lack of a strong procompetitive purpose for such data dissemination, the appellants' evidence clearly presents a jury question under this alternative theory.

2. *Posting of prices*

The appellants also presented evidence indicating that several of the appellees publicly posted their dealer tankwagon prices and any applicable dealer discounts. Specifically, the appellants produced evidence indicating that Mobil, Standard Oil, and Exxon posted such information, for public inspection, at either their company headquarters, division offices, or bulk plants. The appellants also presented testimony from an Arco executive to the effect that Arco "probably" posted its tankwagon prices at its bulk plants. In addition, there is evidence in the record indicating that Arco, among others, checked these postings.

For reasons comparable to those discussed above, we conclude that the practices of posting and checking this detailed information supports a reasonable and permissible inference of an agreement or understanding concerning prices. The appellees' assertedly independent explanation for such posting was that, as one Standard Oil official put it:

> It was our desire to be open and straightforward in the matter of our product pricing and to make available for any customer the ability to look and see what our posted price was. . . . I guess one might say that it was for the logic of being open and aboveboard on what our prices were to our customers. We had nothing to conceal and it was just a mechanism to accommodate that openness.

Another Standard official testified that the posting was done "[f]or the customer's benefit, to inform the customer what the applicable prices were." A Mobil official testified that the purpose of the posting was to allow any individual dealer to come in and check "that he wasn't being discriminated against." It is uncontested, however, that any changes in tankwagon prices or dealer discounts were directly reported to the dealers.

Other testimony indicates that the purpose and effect of the posting was to allow competitors to learn quickly of any withdrawal of dealer support. The following testimony from a Standard Oil official is illustrative:

> Q. . . . Was there any business reason why the temporary dealer assistance that was being granted in the trade zone . . . should have been published or made available to anybody other than the dealers?
>
> A. Yes, I think a practical business reason. If we had raised our prices to our dealers, and our dealers had raised it on the street generally, I think particularly our dealers . . . may have been as much as one, two, three, four cents—they were all over the lot. If a competitor saw this, he might wonder, "Is this a dealer movement, or has Standard Oil Company raised their prices to cause this reaction in the marketplace?" . . .
>
> Q. . . . The reason you are giving, then, is that you wanted the competition to know what the price move was.
>
> A. Exactly.

Given that the evidence thus indicates that the purpose and effect of the public posting was the same as for the press releases, we similarly conclude that a reasonable inference of agreement may be drawn from this evidence.

We also perceive no *Matsushita* problem in permitting such an inference. To the extent that the appellees assert business motivations comparable to those discussed in Section III-B-1, our analysis is the same. Furthermore, given that the appellees' asserted purpose of assuring dealers that there was no discrimination could easily be achieved through other means, we have little difficulty concluding that permitting such an inference will not deter any significant or valuable independent conduct.

Lastly, we perceive an additional reason why the posting of this information may serve as the basis for an

inference of conspiracy. The record indicates that the information posted was unusually detailed, listing tankwagons and dealer discounts for each individual price zone. Such detailed information would have the effect of revealing any gradual shading of wholesale prices that might occur in a particular zone. The record indicates that the spread of such shading was one factor that contributed to the gradual collapse of price restorations. By posting and checking such information, several of the appellees created a mechanism whereby shading might be discouraged or detected. In light of the fact that disclosure of this sort of sensitive price information might be considered contrary to a firm's self-interest, a jury may reasonably conclude that it was the intention and common understanding of these companies to discourage such shading, thus facilitating and possibly lengthening restoration periods.

C. Evidence of Competitor Contacts

The third set of evidence which the appellants claim supports an inference of an agreement consists of evidence concerning alleged contacts between the appellees.

1. *Pre-Container contacts*

The appellants assert that, prior to the Supreme Court's decision in *Container*, the appellees all regularly provided one another with information concerning dealer tankwagons and discounts. The record contains evidence indicating that the appellees did in fact engage in direct communication concerning price levels and dealer support. For example, Agnar Nerheim, a marketing official with Standard Oil, testified that between 1956 and 1958 he telephoned competitors to determine what retail price level they were supporting in the market, and that he sometimes asked what was the specific amount of dealer assistance being given. He also testified that he received similar calls from competitors. When asked about which

specific companies were involved, Nerheim testified that he had such conversations with individuals from Union, Richfield (now ARCO), Texaco, General (now Mobil) and Shell.

Nerheim testified that such price verifications continued after he was transferred to Standard's Los Angeles office. Nerheim stated that he was transferred to Los Angeles because most of the major oil companies were headquartered there, and it would therefore be easier for him to contact competitors. In addition to verifying prices, Nerheim stated that he also spoke with competitors in order to obtain "market intelligence," including information concerning wholesale and retail matters. Among the subjects discussed were the price wars that were taking place in Los Angeles. Nerheim testified that, during this time period, he had discussions concerning such market intelligence with officers from ARCO, Humble (now Exxon), Texaco, Mobil, and Gulf. Most of these contacts were face-to-face visits rather than phone calls. Nerheim stated that he kept no records of these competitor contacts, and that he had been specifically instructed by his superior not to put down on his expense reports the names of any competitors whom he took to lunch. Nerheim stated that such contacts continued until 1967.

Moreover, Robert Erhard, an official with the Carter Oil Company (later acquired by Humble, now Exxon) testified that, sometime between 1959 and 1961, Agnar Nerheim came to his office in Seattle and explained to him how they could converse about pricing without there being any telephone record. According to Erhard, Nerheim explained that the local Standard office in Seattle could reach him on a company WATS line, and that calls could therefore be made through the local office without appearing on company long-distance records. In light of Erhard's and Nerheim's testimony, it seems clear that the record supports an inference that Nerheim engaged

in secret conversations with competitors concerning price levels during the 1960s. Other testimony indicates that other Standard employees engaged in similar conversations with competitors during this time period.

The appellees do not appear to contest the appellants' suggestion that such contacts took place prior to the decision in *Container*. Instead, they raise two arguments as to why the evidence should not be considered as supporting an inference of conspiracy. The appellees first argue that the testimony is "ancient" and is too "stale" to have any probative value. For several reasons, we must reject this contention. First, although all of this pre-*Container* evidence falls outside the limitations period applicable in this case, the district court dismissed this action without ruling on the plaintiffs' claim that the statute of limitations had been equitably tolled by the defendants' alleged fraudulent concealment of their activities. If the statute was tolled, then we would have little difficulty concluding that the appellants' evidence of secret direct price exchanges among the appellees supports an inference of an agreement to fix or stabilize prices. Accordingly, on remand the district court should consider whether the statute of limitations has been tolled; if it has, then the plaintiffs may use this evidence of competitor contacts in order to establish the existence of a conspiracy during the pre-*Container* period.

Second, we think that the pre-*Container* evidence is relevant to establishing the appellees' intent and motive in publicizing, through press releases and posting, their dealer tankwagons, dealer discounts, and supported retail prices. The appellants have produced evidence indicating that these methods of publication were generally meant to serve the same purposes as the direct competitor contacts that had preceded *Container*, and, indeed, that they were used as a substitute for such contacts in the post-*Container* period. Thus, for example, Nerheim testified that, by 1967 (two years before *Container*)

Standard had largely abandoned the practice of verifying its prices directly to its competitors, relying instead on its system of posting such information publicly, a practice which it had begun earlier in the decade. Nerheim stated that, before he left Los Angeles in 1967, such information was publicly posted, and competitors therefore no longer needed to verify prices with him verbally; they would just check the listings and then drop by his office to say hello. Occasionally during this period, however, Nerheim still responded to phone calls requesting information on specific wholesale dealer allowances.

Similarly, C.R. Jones, an official with Mobil, testified that Mobil used several different methods to obtain information from competitors concerning dealer aid, but that the use of direct horizontal communications was dropped after the decision in *Container* was announced. Thereafter, Mobil relied largely on trade publications, contacts with competitive service station dealers, and checking postings in order to obtain information concerning competitors' levels of dealer aid. Although various Mobil bulk plants had been posting in various degrees for some time, after *Container* Mobil instituted a uniform practice of posting at all of its plants across the United States. As noted earlier, this uniform system of posting included publicizing Mobil's tankwagons and dealer discounts for specific trade zones. Mr. Jones specifically testified that this shift in methods did not represent a change in overall business practices:

> . . . The decisions in the *Container* case changed our communications. But we did not intend that it change any business procedures or practices that we had historically been operating under, that we felt were not necessary to change. We were attempting to maintain our conduct on a—in a legal manner, and certainly not attempting to say we have to change our way of life because of a decision in a court case.

We think that this evidence concerning the shift to indirect methods of informing competitors of wholesale price levels provides some support for the appellants' claim that the post-*Container* price publications were made pursuant to a common understanding or agreement. The pre-*Container* activities, which involved verifications of dealer support levels upon personal request, fit squarely within the scope of *Container*. The appellants' evidence suggesting that the appellees shifted methods of communication, without abandoning the goal of giving and receiving such information, supports an inference that the public dissemination of dealer support information was undertaken pursuant to a mutual understanding.[16]

The appellees also claim that the legality of their pre-*Container* conduct was upheld in *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359-60 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977), and *Gray v. Shell Oil Co.*, 469 F.2d 742, 746-47 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). We disagree. First, we note that both of those cases arose under different procedural postures than the present case, and they involved different standards of review. *Hanson* was an appeal from a jury verdict for the defendants after a second trial. The plaintiffs contended that the granting of a new trial after the first jury had ruled in their favor was an abuse of discretion. *Hanson*, 541 F.2d at 1359. After reviewing the record, we held that the trial court did not abuse its discretion in concluding that the first jury's verdict was against the weight of the evidence. *Id.* at 1359-60. In *Gray*, the jury had rendered a verdict for the *defendant*, Shell Oil Co.; we therefore noted that, on appeal, we

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[16] We disagree with the appellees' suggestion that the lack of agreement is clearly indicated by the diversity of publication practices. The fact that the appellees may have chosen different methods of publication does not imply that they did not each recognize and act upon a mutual understanding that such information would somehow be made available to competitors.

were required to view the evidence in the light most favorable to Shell. *Gray*, 469 F.2d at 746. Our standard of review in the present case is, of course, very different from that applied in *Hanson* or *Gray*. Here, the appellants contest the entry of summary judgment against them. We review the district court's decision de novo, and, within the limits established by *Matsushita*, we view the evidence in the light most favorable to the appellants. *See Matsushita*, 475 U.S. at 587-88 (noting that, within the limits imposed by antitrust law, "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion") (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Furthermore, as the appellants correctly note, the claims in *Hanson* and *Gray* were quite the opposite of those alleged in this case. As required by *Container*, in both *Hanson* and *Gray* we undertook a highly fact-specific inquiry. In neither case did we broadly endorse competitor contacts for the purpose of price verification. The plaintiffs in *Hanson* and *Gray* sought to establish that the defendants had conspired to *create* price wars in order to drive independent marketers out of business. *Hanson*, 541 F.2d at 1355; *Gray*, 469 F.2d at 746. We noted that the exchange of wholesale price information was initiated by dealers in *Gray* and by the companies in *Hanson* in order to benefit *dealers* facing severe competition, and we concluded that on the specific facts of those two cases "[s]uch exchange of information does not rise to the level of an illegal conspiracy." *Hanson*, 541 F.2d at 1360; *Gray*, 469 F.2d at 747.

By contrast, the evidence in the present case amply supports an inference that the exchange of price information by the appellees was done with the purpose and effect of allowing greater coordination and stabilization of prices. Thus, while in *Hanson* we distinguished *Container*, noting that "[t]he goal of either company was

not shown to be price stabilization . . . ." 541 F.2d at 1360; *see also Gray*, 469 F.2d at 746-47 ("Here, as distinguished from *Container*, the price inquiries were initiated [by the dealers] and the information was sought, not for the direct benefit of Shell, but for the benefit of the dealers . . . . This is a far cry from *Container*, where the price information was sought solely for the benefit of the manufacturers . . . ."), exactly the opposite is true in this case.

In sum, we conclude that the evidence concerning the appellees' pre-*Container* activities is sufficient, when considered together with the evidence concerning pricing patterns, to support an inference of an agreement to stabilize prices. If anything, the pre-*Container* contacts are stronger evidence of conspiracy than the price dissemination practices discussed above in Section III-B. Accordingly, on remand the district court must consider whether the statute of limitations has been equitably tolled. Furthermore, even if the statute has not been tolled, we think that the pre-*Container* evidence is nonetheless relevant in helping to establish the appellees' intent and purpose in disseminating, during the post-*Container* period, information concerning dealer tankwagons and levels of dealer support and assistance.

Finally, as with the price dissemination practices, permitting an inference of conspiracy from direct competitor contacts will not have significant anticompetitive effects. Appellees have alleged no pro-competitive rationale for their behavior that easily could not be achieved through other means. *See* discussion in II-B-1 and III-B-2 *supra*. Moreover, given that appellees have largely abandoned the practice already there is no reason to believe that allowing the inference now will have any significant economic impact. Thus, we find that the inference of a conspiracy to stabilize prices is permissible under *Matsushita*.

2. *Post-Container contacts*

The appellants point to a number of items of evidence which they claim indicate that direct verbal contacts concerning pricing continued to occur after the decision in *Container*. In their initial pretrial brief below, the appellants asserted that although such contacts were reduced after *Container*, they were not eliminated, and they remained an important supplement to the alternative methods of data dissemination that were "tried and perfected" in the post-*Container* period.

The appellants refer to several instances of direct evidence of competitors contacts after *Container*, some of which concededly involved discussion of price information, and others of which the appellants claim support an inference that prices were discussed. For example, the appellants point out that J.F. Rogers testified that, while he was a pricing manager with ARCO in 1971, he spoke with E.H. McGee of Mobil on a few occasions in order to confirm Mobil's dealer allowances. Rogers also stated that he called McGee on "a couple of occasions" in 1971 in order to confirm preliminary field reports he had received from ARCO employees to the effect that Mobil had withdrawn dealer support and restored its prices. The appellees attempt to belittle this evidence by suggesting that Rogers was a "low-level" employee and by pointing out that he did not report his contacts with McGee to his superior at ARCO, Mr. Douglas.

With regard to the appellees' contention that Rogers was too low-level an employee to be of significance, we see no reason for concluding that such information gathering cannot be delegated to subordinates. Accordingly, the fact that Rogers did not himself have authority to make ARCO pricing decisions is not dispositive. At any rate, an argument concerning the relative significance of Rogers' testimony in light of his position in ARCO's overall chain of command seems more appropriately addressed to a jury than to a summary judgment court.

Furthermore, examination of Rogers' testimony indicates that although he claimed that he did not tell Douglas the source of his information concerning restorations, Rogers testified that he did convey to Douglas the substance of the information obtained:

> Q. Did you report to Mr. Douglas in these instances that you had received confirmation from McGee that Mobil had restored?
>
> A. No, sir.
>
> Q. Why not?
>
> A. Well, I—I didn't think it was necessary for one thing. I—I could—I could report that Mobil had—had restored and I—and I'd already had a preliminary field report, so I was comfortable in reporting it to him a few hours earlier than I would have otherwise.

Rogers claimed that these contacts only shortened by "a few hours" the time in which he could report a Mobil restoration, suggesting that the significance of such contacts was of negligible importance. However, a memorandum written by Rogers to Douglas in late 1971 suggests that such contacts were an important means of verifying or ascertaining whether Mobil was restoring its prices. In the memorandum, Rogers noted that "[e]ven though Mobil announces a restoration, it is often times hard to detect because of rent considerations which are reflected in lower street prices."

The appellants also noted in their pretrial brief that McGee testified that he discussed Mobil's distributor discounts with Herbert Wetzler at some point after the early 1970s. McGee stated that he knew that Wetzler wanted such information as a pricing consultant, although he also stated that he did not know for whom Wetzler was consulting. The record indicates that Wetzler was a consultant for Union beginning in late 1971

and lasting throughout the 1970s, and that he also did some consulting work for Lerner Oil Co., Powerine Oil Co., and the Lundberg Surveys. In addition to the conversations with McGee, Wetzler testified that he spoke with Frank White of Mobil concerning general "market intelligence." Wetzler also testified that, although he did not have a specific recollection, he may have discussed some retail prices with Nerheim after *Container*. Wetzler stated that his understanding of *Container* was that, although he and Nerheim could not discuss their own companies' prices or future prices of any sort, they could discuss past and present prices of other competitors. Although, as the appellees note, Nerheim denied having such conversations, we are required to view the evidence in the light most favorable to the appellants.

The appellants also point to a memorandum from V.T. Chamberlain to Mr. McGee, which described the results of a Mobil survey of competitor publication practices in the Phoenix area. The memorandum states that pricing information "is available at the Texaco plant here in Phoenix." An asterisk is penciled in after the word "the" in this sentence, and the following handwritten comment appears in the margin under a corresponding asterisk: "Not Posted but available on pers. req." One could reasonably infer from this statement that Texaco continued to respond to direct personal requests for dealer price information. Indeed, the appellees' only response to this contention is to argue that any such provision of information by Texaco was innocent because the information provided was "public." For the reasons outlined in Section III-B-1, *supra*, this argument is unavailing.

Lastly, the appellees claim that these items of evidence are too "anecdotal" and fragmentary to support a broad inference of conspiracy of the sort alleged here. Were these items of evidence standing alone, we might be inclined to agree. At the very least, we note that the appellants' evidence of direct competitor contacts is sub-

stantially less impressive for the post-*Container* period than for the pre-*Container* period. Nonetheless, we conclude that, in light of the evidence concerning the appellees' shift to different methods of price data dissemination and the evidence indicating similar patterns of price restorations during the pre- and post-*Container* periods, this evidence supports the appellants' limited claim that direct competitor contacts remained an occasional, although less frequently employed, method of circulating information concerning dealer discounts and supported price levels.[17] Indeed, some of the items discussed above are examples of *direct* evidence of such contacts. As such, we are not free to discredit them on summary judgment. *McLaughlin*, 849 F.2d at 1207-08.[18]

The appellants also claim that the existence of direct verbal contacts after *Container* may be inferred from various items of evidence which they claim indicate that the appellees had advance notice of price changes. In particular, the appellants point to a log kept by W.B. Lovell, a pricing clerk for Standard. The log contains several entries indicating that on a number of occasions Lovell was aware of restoration moves in advance of their effective date. In addition, an ARCO memorandum from Rogers to Douglas indicates that ARCO had obtained advance information concerning Shell's dealer aid levels from "always reliable sources."

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[17] As we found with the evidence of direct competitor contact in the pre-*Container* period, we also perceive no *Matsushita* problem in permitting an inference of conspiracy in the post-*Container* period for the same reasons. *See* III-C-1 *supra*.

[18] We note, however, that this evidence is direct evidence only of the limited competitor contacts specifically described. It requires an additional inference to conclude that the existence of such contacts indicates the existence of other, undisclosed competitor conversations. As noted above, we conclude that, considered in the context of the other evidence in this case, such evidence does at least support a permissible inference that a number of the appellees continued to engage in occasional competitor contacts.

The district court considered this evidence to be of little value because it did not disclose the manner in which Standard had obtained such information. *Petroleum Prods.*, 656 F. Supp. at 1301. For example, the July 26, 1971 Lovell log entry stated that "Ag Nerheim called to inform us of the possibility of Shell returning to normal effective opening of business 7-27-71. Have field watch closely and report any movement to him." The district court noted that "[w]e do not know where Mr. Nerheim got his information concerning Shell's impending move," but, in light of the fact that Shell dealers would have been notified of the move in advance, the district court speculated that "[i]t may be that Mr. Nerheim saw a Shell dealer changing his price posting sign." *Id.* The appellants argue that this sort of speculation defies summary judgment law by failing to view the evidence in the light most favorable to the nonmovant. The appellees contend that the district court merely recognized that, under *Matsushita*, such evidence was insufficient to support an inference of conspiracy.

We appreciate the district court's concern over the absence of any evidence indicating the source of this sort of advance information. As the court correctly noted, it is possible that such information might have been obtained through innocent means, such as the direct observation of retail price changes at individual competitive stations. This concern is especially appropriate where, as here, the record indicates that the appellees regularly conducted surveys of the pump prices at competitive stations. Accordingly, were such evidence standing alone, we would be inclined to agree with the district court that, under *Matsushita*, this evidence does not support an inference of conspiracy. To allow an inference of agreement from such evidence, standing alone, would have the effect of deterring competitors from obtaining information about other companies' actual retail prices, even through legitimate means. We can think of few inferences that would have a more undesirable distorting

effect on market conduct. For this reason, as we found with the pricing pattern evidence, this advance notice information may not serve as proof of an antitrust violation without further evidence that is sufficiently unambiguous and tends to exclude the possibility that the appellees acted lawfully. In the present case appellants have proffered such evidence. Given the other items of evidence that we have already described, we perceive no *Matsushita* problem in permitting the jury to draw a reasonable inference that this advance knowledge was acquired through what are in this case less innocent data dissemination techniques, namely direct competitor contacts or public posting or advance public announcement.

3. *Contacts with independent marketers*

Finally, the appellants rely upon a number of items of evidence which they contend indicate that the appellees used direct contacts in order to coordinate their activities with the independent segment of the market.[19] For example, the appellants presented testimony indicating that Paul Erdos, an officer of the Serve Yourself & Multiple Pump Association ("SYMPA"), an organization of independent gasoline dealers, had conversations with officials of a number of the appellees concerning various pricing matters. Erdos testified that, during the pre-*Container* period, he had conversations concerning dealer tankwagons and wholesale prices with employees of several of the appellees. Charles Temme of ARCO also testified that during the 1960s Erdos provided information concerning upcoming restoration attempts and that Erdos urged ARCO's support. The evidence also indicates that during the post-*Container* period Erdos continued to obtain information concerning dealer tankwagons, either from direct personal contacts, postings, or the trade press. Thus, James Carbonetti of Mobil stated that, dur-

[19] We note, however, that no independent oil company is presently a party in this action.

ing the second half of the 1970s, he provided Erdos with information concerning Mobil's posted tankwagon prices.[20] Erdos also contacted members of the trade press in order to confirm changes in dealer tankwagon levels. Finally, the appellants have produced evidence indicating that Erdos sometimes complained directly to oil companies concerning their dealers' pricing practices.

The most significant evidence of a connection between the major oil companies and the independents comes from the testimony of Kenneth Galligan, an official with Powerine Oil Company. Galligan testified that he and other Powerine officials had a number of conversations with Herb Wetzler of Gulf concerning the independents' pricing. For example, Galligan stated that, shortly after he joined Powerine in 1969, he and several other Powerine officials spoke with Wetzler, who told them that it would benefit everyone if the independents could be "priced and moved as a group," much as the majors had been able to coordinate their pricing.

Galligan also testified that he had other meetings with Wetzler during the period from July 1970 to September 1971. Galligan stated that the purpose of those meetings was to "gain [Wetzler's] cooperation in getting commitments from major oil companies who retailed gasoline in the markets [in which Galligan operated]," and "to arrange with [Wetzler] and establish with him the prices to which those companies would move to on specific dates prior to the time the restoration was made at service station level." Galligan testified that Wetzler told him that "a specific oil company would move its tank wagon price to support a retail price . . . in certain areas on certain dates." It should be noted, however, that Galligan testified on cross-examination that he had no per-

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[20] During this period, Erdos was paid by Mobil for conducting surveys concerning wholesale prices in the independent market.

sonal knowledge concerning whom Wetzler contacted or which majors he contacted. He testified to the same effect on direct examination, stating that Wetzler refused to tell him.

Galligan also testified that he contacted Herb Wetzler, Paul Erdos, and several non-major oil company executives concerning a proposed schedule for a retail price increase in October 1970. In particular, Galligan spoke to Wetzler, who told Galligan that the majors had told Wetzler that if there were any difficulties with the price move, Galligan should wait until Wetzler had had a chance to straighten it out. The following week, Wetzler and Erdos spoke to Galligan and confirmed that the price move had been successful.

Galligan also testified concerning conversations with majors other than Gulf. For example, Galligan testified that, sometime between 1969 and July 1970, he overheard several conversations between Jack Keane of Powerine and Nerheim of Standard. Galligan testified that Keane and Nerheim discussed retail price hikes among independents, and Keane would ask Nerheim what he thought of a particular proposal. Nerheim would usually respond by first saying something like "As you know, Jack, we don't get into that," and then saying something that would indirectly indicate approval such as "That might be a good idea" or "The weather looks good." Galligan also stated that he overheard Keane and Nerheim discussing the schedule whereby the oil companies would restore retail prices. In one case, Standard would go first and Shell second, while in another Standard went first and Mobil second. Galligan testified that he instructed Keane to make these calls in order to confirm information he had received from Wetzler and Erdos concerning when Standard stations would restore their retail prices. After Keane had made one such call, Galligan and Keane discussed what had taken place during the call. Galligan stated that he and Keane concluded

that "Wetzler's information that Standard was committed was true."

In addition, Galligan testified that Keane had received confirmation of Mobil's participation in a restoration directly from a Mobil marketing manager. Furthermore, Galligan testified that the person in charge of retail pricing in Los Angeles for Shell Oil Company committed in advance to retail price restorations. Galligan's information on this score was based on what he was told by Erdos and Wetzler.

In addition to this testimony concerning contacts between the independents and the major oil companies, the appellants presented other evidence concerning contacts among the independents themselves. This evidence indicates that Erdos was involved in coordinating the responses of independent dealers to restoration attempts by the appellees. For example, several memoranda prepared by Newton Carey, a general manager for the independent oil company Simas Brothers, summarized a number of phone calls that Carey received and made to other independents. Several of these calls, including a number involving Erdos, concerned price changes among the independents after major oil company restorations. Many of the calls appear to have involved quite blatant price-fixing activity. Thus, Carey's October 12, 1970 memorandum to Mr. Simas states that "I phoned Mr. Erdos and asked him about getting those Douglas stations up in the El Cerrito area. He said that he would phone."

Furthermore, Galligan testified that, while at Powerine, he asked Erdos on numerous occasions to contact competitors, both major and independent, to see what their reaction would be to a proposed retail price restoration. Erdos would get a commitment from these competitors before the restoration took place. Galligan also stated that Powerine would never restore its prices unless it had a prior commitment from the "vast majority of major oil companies."

Other portions of Galligan's testimony are to the same effect. Galligan stated that Erdos was frequently a source of advance information concerning various companies' participation in price increases, although most of the time Galligan got this information indirectly through Keane or Wetzler. Galligan stated that Erdos' job was to "get people in line for future pricing," and after the price increase had taken effect, to threaten non-complying dealers that they had better participate or they would face retaliation from their suppliers.

We have little difficulty concluding that, if admissible, this testimony is sufficient to permit a jury to conclude that representatives of several of the appellees were involved in activities designed to assure that the independent sector of the market would follow restoration attempts, and that several officials of independent companies engaged in direct price-fixing with one another in order to produce such coordination. The appellees, however, argue that there are a number of evidentiary problems in Galligan's testimony and that, without this testimony, the appellants do not have sufficient evidence to establish a link between the independent market and the appellees. For several reasons, the district court agreed with the appellees. First, the court concluded that most of Galligan's testimony was irrelevant or immaterial. Second, the court also concluded that most of the testimony was hearsay. Third, the court noted that Galligan's testimony had been challenged "by every other relevant witness" and that Galligan had been "substantially discredited." *Petroleum Prods.*, 656 F. Supp. 1302-03. In reaching these conclusions, however, the district court did not focus upon any specific portions of Galligan's testimony; the court simply rejected it in a wholesale fashion.

In light of our above discussion of certain specific portions of Galligan's deposition, we have little doubt that such testimony is relevant and material to the issues

in this case. The hearsay issue, however, is somewhat more difficult. We note that much of the information provided by Galligan consists of out-of-court statements of third parties. As such, the statements initially appear to fit within the definition of hearsay specified in Fed. R. Evid. 801(c). Upon closer analysis, however, we conclude that each of the statements qualifies as non-hearsay under either Rule 801(d)(2)(D) or Rule 801(d)(2)(E).

Rule 801(d)(2)(D) provides that a statement made by a party's agent or servant may be introduced against that party if it concerns a matter within the scope of the agency or employment and was made during the existence of the relationship. We conclude that this exception applies to Wetzler's various statements that Gulf would support retail price restorations. Wetzler was Gulf's marketing director, and the statements are therefore related to a matter within Wetzler's scope of employment. We reach this conclusion despite the fact that the appellees point out that Wetzler testified that he did not have authority, on his own, to raise Gulf's prices whenever he wanted to do so. First, we note that Wetzler testified that he was responsible for gathering "market intelligence" for his superiors and that he acted as a liaison between top Gulf management and the field with respect to "price changes approved by top management [or] initiated in the field." In light of these duties of Wetzler, it seems clear that the statements that Galligan claims Wetzler made are related to a matter within his scope of employment. Second, in light of the fact that the Supreme Court has held that under Fed. R. Evid. 104(a) an out-of-court statement may be considered by the court in making the preliminary factual determinations concerning admissibility of statements under Rule 801(d)(2)(E), *see Bourjaily v. United States*, 483 U.S. 171, 177-81 (1987), we conclude that Wetzler's out-of-court statements may themselves be considered

in determining the preliminary question, under Rule 801(d)(2)(D), of the scope of Wetzler's employment duties. Since the statements clearly indicate an ability to communicate information on behalf of Gulf, we conclude that, considering all of the evidence, Wetzler's statements concerned a matter within the scope of his employment.

In light of this conclusion, no further showing is required to admit these statements against Gulf. *See United States v. Ramsey*, 785 F.2d 184, 191 (7th Cir.) (statements admitted under Rule 801(d)(2)(D) may be used to prove conspiracy without any showing that the existence of the conspiracy is corroborated by independent, nonhearsay evidence), *cert. denied*, 476 U.S. 1186 (1986); *see also United States v. Cross*, 816 F.2d 297, 302 (7th Cir. 1987) (same). Similarly, Nerheim's statement that Standard was committed to a retail restoration is admissible against Standard. None of these statements is admissible against the other defendants, however, unless they meet the requirements of Rule 801(d)(2)(E), which relates to statements of a coconspirator.

Rule 801(d)(2)(E) provides that a statement made by a coconspirator of a party may be introduced against that party if the statement was made during the course, and in furtherance, of the conspiracy. The numerous instances wherein various third parties assertedly told Galligan that certain defendants had agreed to price restorations would appear to be prime candidates for this exception from the definition of hearsay. As noted above, Galligan's testimony included evidence of the following statements: Wetzler said Standard was committed to a particular restoration; Nerheim said that on particular occasions Shell and Mobil were committed; Erdos and Wetzler said Shell was committed to a particular increase.

Before these statements can be admitted, however, they must meet all of the prerequisites of Rule 801(d)

(2)(E). Specifically, the party seeking to introduce the statement must show, by a preponderance of the evidence, that "there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'in the course and in furtherance of the conspiracy.'" *Bourjaily*, 483 U.S. at 175. Although a judge may consider the statements themselves in deciding whether these prerequisites have been met, *see id.* at 177-81, the offering party must present "*some* evidence aside from the proferred (sic) coconspirator's statements [to] show that the [nonoffering party] knowingly participated in the alleged conspiracy." *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988); *see also United States v. Gordon*, 844 F.2d 1397, 1402 & n.2 (9th Cir. 1988). Moreover, in *Silverman* we defined the character of the additional evidence: "[E]vidence of conduct that is completely consistent with defendant's unawareness of the conspiracy" cannot serve as corroborating evidence under Rule 801(d)(2)(E). *Silverman*, 861 F.2d at 578.

In the antitrust context the *Silverman* requirement can be met if the circumstantial evidence offered in addition to the coconspirator's statements is adequate to defend against summary judgment under *Matsushita*. Under *Matsushita* in order to survive summary judgment on the basis of circumstantial evidence alone, a plaintiff must offer evidence that is consistent with an inference of illegal conduct and permitting that inference must not be significantly harmful. This requirement comports with the *Silverman* mandate against allowing "wholly innocuous conduct" alone to serve as proof of conspiracy. *Id.*

In the instant case, the press releases, price postings and evidence of competitor contacts previously discussed provide evidence of a conspiracy aside from Galligan's statements. Since we have concluded earlier that appellant's evidence is sufficient to survive summary judg-

ment under *Matsushita*, the appellants have met their burden of producing *some* evidence apart from Galligan's testimony that indicates the existence of conspiracy.

The remaining question, then, is whether this evidence along with Galligan's statements are sufficient to show, by a preponderance of the evidence that there was a conspiracy. Viewing the evidence in the light most favorable to appellants, we find that there is sufficient evidence to conclude, for purposes of Rule 801(d)(2)(E), that the appellees were coconspirators.[21] The statements are therefore admissible against all defendants under Rule 801(d)(2)(E).

Finally, we reject the district court's suggestion that Galligan's testimony could be disregarded because it had been "substantially discredited." *Petroleum Prods.*, 656 F. Supp. at 1303. It is well-established that "[c]redibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The two cases cited by the district court, *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 344 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983), and *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975), do not support its conclusion. *Mesirow* and *Radobenko* dealt with the narrow situation where the only material issue of fact was created by a party's own directly contradictory affidavits or deposition testimony, given during the course of the same litigation. In *Mesi-*

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[21] We are *not* deciding the greater question of whether there was a conspiracy to fix prices. Nor are we deciding whether Galligan's testimony should be admitted during trial. When the lower court judge makes that decision he will not be viewing appellant's evidence from the same procedural posture. We simply are deciding the very narrow issue of whether the court can consider Galligan's testimony for the purposes of summary judgment on the discrete issue of independent dealer contacts.

row and *Radobenko*, we held that, under those narrow circumstances, the party's conflicting statements do not create a genuine issue of material fact. In the present case, by contrast, Galligan is not a party, and he has not given flatly contradictory testimony during the course of this litigation.

Since Galligan's testimony is admissible for summary judgment purposes against all of the appellees, we conclude that his testimony, considered along with the other evidence discussed in this subsection, is sufficient to create a jury question as to whether the appellees, as part of their efforts to coordinate their own prices, also sought to assure that the independent oil companies would coordinate their pricing behavior.[22]

IV. APPELLANTS' CLAIMS OF A CONSPIRACY TO RESTRICT SUPPLY

In the proceedings below, the plaintiffs also alleged that the defendants engaged in a conspiracy to restrict the supply of crude oil and refined petroleum products. The plaintiffs claimed that the defendants' efforts to restrict supply culminated in the August 1972 "restoration to end all restorations." That is, after August 1972, price cycling stopped; from that point forward the pressure created by supply shortages was sufficient to keep prices at their restored "normal" level, and indeed, in 1973 retail prices began a steady climb as supplies continued to prove inadequate to meet growing demand. The district court, however, concluded that the plaintiffs had failed to produce sufficient evidence to support their

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[22] Because there is direct evidence of defendant's efforts to coordinate pricing with the independent segment of the market, the *Matsushita* standards for summary judgment do not apply to this evidence. *McLaughlin*, 849 F.2d at 1207. We simply decide whether there is a genuine issue of material fact. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

claims of a conspiracy to restrict supply, and it therefore granted summary judgment to the defendants.

On appeal, the appellants assert that they produced sufficient evidence to permit a jury to conclude that the appellees agreed to engage in various activities designed to reduce the domestic supply of petroleum products. They contend that, as part of this conspiracy, the appellees agreed to exchange information concerning actual production levels, expected future demand, and expected supply projections. The appellants also assert that, as part of the same plan, the appellees conspired to reduce the amount of crude oil lifted overseas and shipped into the United States. We will consider each of these contentions in turn.

A. Domestic Activities

The appellants have produced evidence indicating that by the early 1970s several of the appellees had come to the conclusion that excess production was a key factor in creating price wars. As the district court noted, "[t]he files of several of the defendants contained in-house memoranda that expressed dissatisfaction with the practice by their respective employers of producing so much gasoline that they were obliged to sell the surplus to independents, who, in return, competed with the sellers at reduced prices." *Petroleum Prods.*, 656 F. Supp. at 1307. The appellants also produced evidence indicating that several of the appellees had begun thinking that it would be better to eliminate this excess production, but that they also recognized that this could not be accomplished without some sort of joint action. For example, in commenting on the National Oil Jobbers' Council's recommendation that "excess" production be eliminated, a 1971 internal Shell memorandum remarked: "good thought—how accomplish short of collusion." An earlier May 1971 Shell memorandum had reached a similar conclusion:

> If the wholesale price of gasoline moves up commensurate with the current and anticipated crude price increases and *refinery operations are geared to maintaining such increased wholesale prices*, then cut-price marketers will have to raise their prices proportionately. . . . [This alternative] involves one refiner after another acting in statesmanlike fashion.

(emphasis added).

The appellants contend that the appellees reached an agreement or understanding to restrict supply in this fashion in part by means of an exchange of information concerning projected supply and demand. In this regard, we note that the record indicates that several of the appellees did in fact occasionally obtain information, sometimes through direct personal contacts, concerning supply and demand forecasts and production levels. For example, a May 1972 Mobil memorandum summarized the aggregate crude oil demand forecasts of several competitors, including appellees Mobil, Exxon, Texaco, Gulf, and Shell. The memorandum indicated that the information had been obtained from a variety of sources, including direct competitor contacts. The memorandum noted that "[i]n several cases we were able to get quite specific volume figures by area from direct contacts." In most of the other cases, the information had been obtained from press releases, public statements, or annual reports, and in many of these instances, Mobil was "able to render [the figures] more precise by checking them out with people we know inside the companies." The exchange of supply information among the appellees is further indicated by the fact that ARCO had in its files a copy of a detailed summary of supply and demand forecasts that had been prepared by Union.

In addition, the appellants produced a June 1972 Mobil memorandum reporting the results of direct competitor contacts with officials of Texaco, Exxon, and Gulf concerning sour crude production capabilities. The mem-

orandum indicates that the competitors had provided fairly detailed information concerning refinery processing levels. Although, as the appellees note, the memorandum indicates that the information was obtained for the purpose of buying and selling crude oil, one could reasonably conclude that the detail of the information obtained exceeded that which was necessary for this purpose.

The appellants also presented evidence indicating that the appellees were able to obtain detailed competitive information concerning supply by participating as observers at meetings of the Independent Petroleum Association of America ("IPAA"). For example, a memorandum in Standard's files contained an IPAA chart listing the supply projections made by several different oil companies. The chart lists, for each quarter of 1970, the supply projections for several different types of petroleum products. Although the chart "anonymously" labels each company by a code letter, the Standard copy has the names of the various companies handwritten along the top of the chart. The companies listed include Union, Getty, and Shell. The record also indicates that Standard itself submitted supply projections for 1970 to the IPAA.

The record also reveals that ARCO obtained similar IPAA supply forecasts for the year 1971. ARCO's 1971 chart, like Standard's 1970 chart, contains additional notations indicating which companies made which forecasts. The cover memorandum accompanying the chart states that this information is valuable because "the exact expectations of 8 oil companies and 2 banks are revealed in detail." The memorandum also noted that, although most majors did not formally participate in IPAA activities, "most are present as observers to receive the materials and to contribute to the discussions. This includes even the usually highly reticent Texaco."

We also note that the appellants have produced an Exxon memorandum from August 1972 (the month that

price cycling ended) indicating that Exxon had contacted a large number of oil companies in order to determine their crude oil supply situation. The memorandum contains a chart summarizing the information obtained as a result of these contacts. Among the companies whose supply information is listed are ARCO, Standard, Getty, Gulf, Mobil, and Shell. The information obtained indicates that most of these companies expected to experience supply shortages during the remainder of 1972.

In response to this evidence, the appellees raise two arguments. First, they contend that these exchanges of information were "innocuous" and that no inference of conspiracy can be drawn from them. This argument cannot be squared with the Supreme Court's holding that, under certain circumstances, the exchange of production and supply information may supply "an attractive basis for cooperative, even if unexpressed, 'harmony' with respect to future prices." *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, 398 (1921); *see also* Sullivan, *Antitrust* § 97 (1977) (Data as to production figures "can be used to police production quotas imposed by a cartel or, in an oligopolistic structure, can facilitate interdependent action in reducing output.") *American Column & Lumber* teaches that production and supply data dissemination cannot be treated as categorically different from price information exchanges. Accordingly, application of the principles of *Container* in the supply data context suggest that an agreement to exchange supply and production information may, under appropriate circumstances, serve as circumstantial evidence of an agreement to restrict supply and raise prices. We think that, in light of the evidence concerning the appellees' intent to stabilize the market by reducing excess capacity, *see infra*, an inference of conspiracy drawn from the appellants' evidence of supply data exchanges is plausible.

Second, the appellees argue that the shortages experienced during 1972 and 1973 were real, and that their

production facilities operated at "record levels" during this period. In particular, the appellees point out that their refineries were operating at the "maximum sustainable rate." The appellants do not dispute this latter point; instead, they claim that the appellees deliberately chose not to expand refinery capacity and that they did so in order to create a shortage.

In support of this claim, the appellants produced evidence indicating, for example, that Standard chose not to expand refinery capacity, despite long-range forecasts of a shortage. Similarly, an Exxon employee based his conclusion that Exxon's refining capacity was sufficient on the assumption that sales of gasoline to the independents would be curtailed. A Shell official reached a similar conclusion that a "conservative" program of refinery expansion would avoid "throwing surplus products into the market place." Furthermore, as the district court noted, *see Petroleum Prods.*, 456 F. Supp. at 1307, an Exxon study committee recommended that refining capacity not be expanded until "forecasts show large and growing shortages for at least two years prior to the onstream time of the expansion." Other items in the record further indicate the appellees' concern with the problem of spare capacity. For example, a 1971 Exxon memorandum noted that Exxon considered the "spare capacity problem to be the single most important problem facing the refining segment of our business over the next several years." Finally, the appellants produced evidence indicating that the resulting "lull in domestic refining capacity construction" contributed to tight supplies and upward pressure on petroleum prices. As one September 1972 Shell memorandum put it, "[t]he current shortage being proclaimed is more apparent than real. Refining capacity has merely moved from a 'long' supply position to what could be characterized as a 'balanced' position. . . . It just feels 'tight' to some people who have been used to a 'long' situation for a number of years."

The district court, in ruling on the motion for summary judgment, simply accepted the defendants' explanations for the shortage and for the lack of refinery expansion. With respect to the failure to expand refinery capacity, the court noted that the cost of constructing refineries had gone up, that evironmental litigation was a concern, that it was hard to estimate how much refinery capacity was necessary, and that price controls were a disincentive to further expansion. *Petroleum Prods.*, 656 F. Supp. at 1307-08. With respect to the shortage, the court blamed it mostly on increasing demand. The court asserted that demand had increased due to various factors, such as more people driving and the increasing number of cars with air conditioning and power-operated features. *Id.* at 1308. The court finally concluded that the evidence showed "quite clearly" that the defendants' actions were the result of independent decisions. *Id.* at 1309.

We think that the district court misconceived the nature of its task under *Matsushita*. As noted earlier, *Matsushita* does not authorize the district court to weigh the evidence and decide which inference is the more plausible one; so long as a particular inference is plausible and permissible under *Matsushita*, it is for the jury to decide whether to draw it. *Matsushita*, 475 U.S. at 587-88. The district court in this case appears simply to have adopted one of two competing theories of the evidence. *Matsushita* does not authorize this sort of resolution, on summary judgment, of disputed issues of fact.

Appellants have offered a plausible conspiracy theory. The evidence supports the conclusions that (1) in the early 1970s several of the appellees began taking steps to reduce excess capacity; (2) they did so with the intent and effect of reducing the strength of the independent sector of the market; (3) during this period the appellees exchanged information concerning supply forecasts and production levels, and (4) the shortage of refining capacity, as well as the foreign activities of several of the

appellees (discussed below), resulted in supply shortages and upward price pressure. Most significantly, however, it seems clear that these objectives could only be achieved if all others performed similar actions. A single company reducing output would lose market share and sales. Only if all the companies reduced supply would the price rise enough to increase profits. The risk involved in leading a supply reduction suggests that purely interdependent supply decisions are unlikely. Changes in refinery capacity are not readily reversible. Once a company is committed to reducing its capacity it cannot easily recover if the other companies do not follow its lead. Thus, it is unlikely that a firm would undertake a reduction in its refinery capacity without some advance agreement from competitors. It is in this context that the exchange of supply and demand forecasts must be considered. We think that, viewing all of this evidence, a rational jury could conclude that the appellees had agreed to exchange supply and demand forecasts in order to facilitate mutual decelerations of increases in production capacity.

This does not settle the matter, however. The question remains whether permitting an inference of conspiracy from the evidence that the appellants have produced would have the effect of deterring important independent conduct. We conclude that it would not. As we stated previously, appellants have offered evidence that the exchange of information followed by shortage was accompanied by appellees' actions to reduce excess capacity, appellees' anticompetitive intent, the actual reduction in the independent sector, and appellees' recognition of the need for parallel action. Appellants have also offered evidence of market conditions in which interdependent supply decisions are unlikely. Although an inference of conspiracy could not permissibly be drawn *solely* from the exchange of supply forecasts followed by a shortage, we can conceive of no significant procompetitive behavior that will be deterred by permitting an inference of conspiracy when

the combination of actions and intent described above occurs.[23]

B. Foreign Activities

The appellants also contend that, as part of the alleged conspiracy to restrict supply, the appellees agreed to restrain Middle East production of petroleum products. In support of this contention, the appellees point to a number of items of evidence indicating that the appellees engaged in discussions about how to keep supply pressures under control. For example, in response to the problem of spare capacity in Iran, the five American majors (Exxon, Gulf, Texaco, Mobil, and Standard) who owned shares of the Iranian Consortium ("IOP") agreed in 1968 that in deciding upon planned capacity targets, the group should be careful not to rely simply on their own estimated needs inasmuch as this procedure might result in capacity figures being set too high. As a memorandum distributed among the five companies indicated:

> Members should [review] the IOP weighted figures to be sure that growth rates in planned capacity are consistent with annual growth rates generally ex-

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[23] Unlike the tankwagon price information discussed earlier, petroleum supply and demand information is important to a number of actors in the economy, and courts should hesitate to permit inferences of conspiracy based on the exchange of supply information alone. Such an inference will not have a negative deterrent effect, however, when it is based on the combination of actions and intent in this case. For example, while it might have harmful anticompetitive effects to allow an inference from the exchange of supply forecasts alone, it might not be harmful to allow that inference from supply forecasts and actions to reduce capacity and evidence of anticompetitive intent. Companies who were innocently distributing supply information would be unaffected by an antitrust rule that only prohibited the exchange of supply forecasts when accompanied by actions to reduce excess capacity and evidence of anticompetitive intent. Thus, permitting the inference in this case will not have an undue deterrent effect on the proper dissemination of petroleum supply and demand information.

> pected for demand, rather than relying solely on the composite of individual Member estimates for each forward year. In this regard it should be appreciated that small changes in growth percentages lead to plans for rather large capacity additions several years forward.

The record also indicates that the IOP members jointly agreed to resist the Shah of Iran's efforts to get IOP to increase available capacity.

The record also contains evidence indicating that the owners of Aramco (Exxon, Standard, Mobil, and Texaco) held a two day meeting aimed at arriving at a response to Saudi Arabian complaints that their oil liftings were not keeping pace with those of other countries such as Iran. During the course of these discussions, Texaco proposed that, if the other IOP owners who were also owners of Aramco would do likewise, it was willing to reduce its liftings in Iran in order to improve Aramco's relative position. Although, as the appellees note, Mobil labeled this blatant cartel allocation proposal "ridiculous," "Mobil did state, however, that if [they] had a competitive price in Aramco, they felt it would definitely hold down the growth rate in Iran." Similarly, although Exxon also rejected Texaco's proposal "legally and for other reasons," it also stated that "it would be our policy to have our Iranian liftings so that they could be defensible with our Aramco performance." Other evidence further indicates that the Aramco owners recognized the need to coordinate production levels among Iran and Saudi Arabia in order to alleviate Saudi pressure for increased production.

Finally, we note that the appellants produced evidence indicating that, in connection with these various activities, several of the appellees circulated amongst themselves memoranda containing specific information regarding supply and demand projections for various regions of the world.

The appellees raise a number of arguments in response to this evidence. First, they contend that, because IOP and Aramco "were created or operated with the knowledge and acquiescence of the United States Government," the actions taken by the two consortiums cannot serve as a basis of antitrust liability in this case. This argument is without merit. Even if the President had approved the cartel there is no evidence indicating that he authorized any of the appellees' alleged concerted efforts to hold down the growth of foreign production.[24]

Second, the appellees argue that each item of evidence upon which the appellants rely does not in fact support an inference of conspiracy. Indeed, they assert that the evidence indicates normal business behavior. Once again, however, we emphasize that it is not our task to decide whether we think that an inference of innocent conduct is more plausible than an inference of conspiracy. Rather, our task is to consider whether an inference of conspiracy is plausible and whether permitting such an inference would have the effect of deterring significant procompetitive conduct. We recognize that it is possible that each IOP owner company independently resisted the increases in production requested by the Shah. However, when considered in the context of their domestic activities with regard to prices and supply, the various actions that the consortium members took in order to control the level of growth in Middle East production plausibly could be construed as part of a conspiracy to restrict supply. In addition, appellees have suggested no procompetitive behavior that would be deterred if plaintiffs were allowed to bring antitrust actions against defendants who undertook the domestic and foreign supply actions alleged in this case.

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[24] Because there is no evidence of the President's approval of the cartel's activities at issue we need not reach the question of whether it is within the powers of the executive branch to convey antitrust immunity through its acquiescence in an overseas consortium.

We conclude that the appellants have presented sufficient evidence concerning their allegations of a conspiracy to create a shortage to warrant submission of the issue to a jury. Accordingly, the district court erred in granting summary judgment on these claims. Furthermore, we note that since the parties agree that the shortage, however caused, led to the elimination of the competitive bidding market in bulk sales to government entities, the appellees may be held liable for this consequence if the jury concludes that they did in fact jointly act to restrict supply.

V. *CALIFORNIA'S CLAIM FOR CIVIL PENALTIES*

The State of California also appeals the district court's January 12, 1978 order dismissing California's claim for civil penalties under Cal. Civ. Code § 3370.1.[25] The district court concluded that it had no jurisdiction to entertain the claim because to do so would, in its view, have violated the principle that federal courts generally do not enforce the penal laws of the states. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888); *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).

We disagree with the district court's conclusion. The Second Circuit recently rejected a similar challenge to enforcement, in federal court, of pendent state antitrust law claims for civil penalties. *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1086 (2d Cir.), *cert. denied*, 109 S. Ct. 128 (1988). The court noted that, although the "federal courts have no jurisdiction to enforce the criminal laws of the states, they do have jurisdiction to enforce state penalties that are civil in nature." *Id.* Since California treats the penalties under § 3370.1 as civil in nature, *see People v. Superior Court (Kaufman)*, 12 Cal. 3d 421, 431, 525 P.2d 716, 115 Cal. Rptr. 812, 818-19 (1974); *People v. E.W.A.P., Inc.*, 106 Cal. App.

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[25] Cal. Civ. Code § 3370.1 has since been recodified as Cal. Bus. & Prof. Code § 17206.

3d 315, 321, 165 Cal. Rptr. 73, 76-77 (1980), the district court was not barred from entertaining the claim. *Hendrickson Bros.*, 840 F.2d at 1086. Because the district court found this case to be otherwise "ideal" for the exercise of pendent jurisdiction, we reverse its order dismissing California's claim for civil penalties.

VI. CONCLUSION

The judgment of the district court is REVERSED and the case is REMANDED.

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APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 (WPG)

ALL STATE CASES

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM OF DECISION

[Filed Nov. 25, 1986]

In this long pending litigation, the Attorneys General of the plaintiff States charge the defendant major oil companies with violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The contentions are that these defendants conspired to fix the retail prices of gasoline, to create in this country shortages, either actual or purported, of petroleum products, and to refrain from competing with each other for contracts for the sale of petroleum products to the plaintiff States and their governmental subdivisions. The defendants have moved for summary judgment on each of these issues; such motions were argued on November 19, 20 and 21, 1985; and the matter was taken under submission by the court. The defendants' motions now will be granted.

In the laborious process of reaching this decision, I have reread the extensive briefing on the motions, studied the transcript of the oral arguments, and examined all of the exhibits that were referred to in such arguments. Having done so, I am convinced that, after several years of exhaustive discovery, the plaintiffs simply do not have the proof necessary to establish their contentions.

The plaintiffs have disclosed no direct evidence of conspiratorial conduct and, with the exception of Florida, which will be discussed later, they almost admit such lack. Instead, in their pretrial briefs and their opposition memoranda, the plaintiffs rely upon certain factual items and comments selected from the mass of documentary and deposition material that they have obtained. From this material they draw inferences favorable to their contentions and assert that they thereby have presented issues that must be resolved by a jury. In doing so, they embrace the proposition laid down in *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."

However, such a process fails to meet the standard announced by the Supreme Court in *Matsushita Electric Industrial Co. Ltd., et al. v. Zenith Radio Corp., et al.*, —— U.S. ——, ——, 106 S. Ct. 1348, 1357 (1986), which was decided after the plaintiffs' documentary and oral presentations were submitted:

> "To survive a motion for summary judgment . . ., a plaintiff seeking damages for violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently [citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)]. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action . . . ."

As will be discussed in this memorandum, the defendants, in accordance with Fed. Rule Civ. Proc. 56(c), have made a substantial evidentiary showing that in all relevant respects they acted independently and in their individual interests. In the face of such showing, the plaintiffs have the burden of coming forward with "spe-

cific facts showing that there is a genuine issue for trial." Fed. Rule. Riv. Proc. 56(e). The Supreme Court, in *Zenith*, also instructs us that under such circumstances the plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts, . . ." and that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" —— U.S. at ——, 106 S. Ct. at 1356 (1986).

Many of the inferences of collusion that the plaintiffs draw from the evidence must be categorized as *non sequitur*. Some of the inferences are based upon facts that could be considered to be in harmony with the existence of a conspiracy if the existence of a conspiracy be assumed. However, such facts are equally in harmony with competitively motivated individual conduct, and we know from *Zenith* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." —— U.S. at ——, 106 S. Ct. at 1357 (1986). None of the facts relied upon by the plaintiffs constitute evidence " 'that tends to exclude the possibility' that the alleged conspirators acted independently," as is required by *Zenith*.

In approaching the task of resolving these motions for summary judgment, I have kept fully in mind the injunction in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962) that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles." On the other hand, I also am aware that *Poller* "merely teaches caution," *Barnes v. Arden Mayfair Inc.*, 759 F.2d 676, 680 (9th Cir. 1985) and that "if there is no genuine issue of material fact, and if the resisting party does not present a record sufficient to support a reasonable finding in his favor, a district court has a duty to grant the motion for summary judgment." *Filco v. Amana Refrigeration*

Inc., 709 F.2d 1257, 1260 (9th Cir. 1983). This court is convinced that the foregoing quotation states the situation here concerned and that the duty to grant summary judgment follows accordingly.

In discussing the bases for my ruling, I cannot hope to advert to each of the hundreds of evidentiary items upon which the parties rely in pursuing and opposing the current motions. However, I shall undertake in somewhat general terms to discuss what the facts in the record show and do not show with respect to the alleged conspiracies. I also shall comment upon some specific factual contentions, in support of my representation that I have given careful consideration to the record, and in order to illustrate some of the difficulties that I have with the plaintiffs' case.

I. THE ALLEGED PRICE FIXING CONSPIRACY

The defendants regularly refine gasoline which they sell to operators of retail service stations at what are called tank wagon prices. The retail dealers, in fixing the prices that they charge the consuming public, add to the tank wagon prices whatever they feel the traffic will bear, in light of prices charged by competing stations.

In times when supply is plentiful, prices tend to work their way downward as some dealers seek to increase their market shares by charging less, prompting competitors to do likewise. This downward trend is usually led by "independent" stations that are not affiliated with the defendant major oil companies.

If a retail gasoline dealer that sells the product of one of the majors fails to participate in these price reductions, his market share decreases, resulting in loss of income to him and his supplier. Accordingly, the defendant companies, in order to enable their dealers to remain competitive, share with them the burden of having to reduce the retail prices by giving them discounts from the

tank wagon prices. The continuation of these successive reductions in retail prices, known as "price wars," results in losses to everyone except the consumer. In due course, one or more of the defendant companies concludes that the market has "had enough" and removes or reduces the dealer discounts and thus restores or approaches the published tank wagon prices. (Such actions will be referred to hereinafter as "restorations.") The other majors usually make similar restorations, and their respective dealers normally find themselves obliged to respond promptly with corresponding increases in their retail prices to the consumers. The independents tend to do the same. Thus, the market prices return to the levels from which the decline started. In due course, however, the competitive desire to increase market share causes the downward movement of retail prices to begin again, and the cycle of dealer discounts, price wars and restorations starts all over again.

A. *Regarding Plaintiffs' Initial Contention That The Defendants Conspired To Have Simultaneous Restorations.*

The initial contention of the plaintiffs was (and possibly still is) that the share restorations to "normal" tank wagon prices were agreed upon in advance by the defendants and thus constituted an antitrust conspiracy. They undertake to support this contention in several ways.

1. *The Lundberg Surveys.* The plaintiffs rely primarily upon recordations by Lundberg Survey, Inc. of retail gasoline prices in the principal metropolitan areas of the plaintiff states. The plaintiffs have charted these prices, and such charts are remarkably similar with respect to the various areas. They uniformly show that the prices of gasoline at retail stations moved downward by a series of steps during periods of weeks or months. The prices then suddenly jumped back to the starting point, the

charts reflecting a substantially vertical upward return. These successive cycles give a sharp "saw-tooth" appearance. The charts also show the retail prices of the independents moving with those of the majors' stations in almost an identical manner but about four cents per gallon lower. The plaintiffs contend that the charts are strong evidence of conspiratorial actions, because the restorations would not have been so instantaneous and with such unanimity if the defendants had been acting independently. The defendants challenge the significance of the charts as indications of conspiracy. I agree with the defendants.

(a) *The charts do not show the defendants' wholesale prices.* The charts purport only to show the retail prices at the service stations, rather than the prices that the defendants charged their dealers. It is far from established that retail dealers lowered and raised their prices automatically with, and proportionate to, the discounts that were granted and later withdrawn by their defendant suppliers. The evidence shows that some dealers increased their prices while still receiving discounts, because they could no longer afford to do business at low margins, or because they saw competitors' published prices go upward. Others dropped their prices to meet competition, even though corresponding discounts were not granted by their suppliers. The plaintiffs recognized in their Initial Pretrial Brief (paragraphs 3-507 - 3-525) that "maverick" dealers, those that did not follow prices suggested by their respective major suppliers, had a very significant effect upon the retail gasoline market. Thus, the cycle of retail price changes reflected by the charts does not establish that the defendants' wholesale prices followed the same pattern.

(b) *The charts reflected prices recorded weekly.* The plaintiffs refer to the charts as showing simultaneous price restorations by all defendants. This is not necessarily so, because the Lundberg people only undertook to

chart the stations weekly. For example, a Mobil dealer might raise his prices four cents on Monday, due to advance notice of a restoration that Mobil had given him on the preceding Friday. The owner of an Arco station across the street would note and report this change to his supplier, with the result that he received a dealer's allowance and increased his prices by four cents on the following Friday. The Lundberg representative would check both stations later that same Friday and report the two increases as having been simultaneous, despite the gap of at least four days in the respective determinations by Mobil and Arco to institute them.

(c) *The charts show average prices.* According to Mr. Lundberg in his deposition, the fact that he averaged his data concealed price differences of as much as eight cents per gallon, which tends substantially to mask the relationships of the individual price changes to each other, as well as differences in their timing.

(d) *Closely parallel retail prices of gasoline do not establish conspiracy.* It is evident from the foregoing that the charts based upon the Lundberg Surveys do not show that the defendants changed their respective wholesale prices at the same times and to the same extents. They do show, however, that retail gasoline prices tended to move downward for a while and suddenly to jump back up to the point from which the decrease began. Wholesale prices play a major part in any decision to set retail prices, and we therefore can assume that the defendants' wholesale prices had a tendency to follow a similar pattern. But that is the most that can be assumed from the charts. The plaintiffs urge that "the critical question in assessing the parallel nature of defendants' prices is not what the individual prices were but rather whether the 'central tendency" of each defendant's prices was to move up at the same time as the prices of other defendants." (Plaintiffs' opposition brief, page 22.) However, a showing of such similarity is at

least as indicative of vigorous and alert competition as it is of collusion. "[E]ven if [the plaintiff] could establish closely parallel pricing patterns between the two brands, in an industry where prices are likely to be similar, such evidence does little to establish an illegal conspiracy." *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1362 (9th Cir. 1976).

2. *Instances Of Prior Knowledge Of Restorations As An Indication Of Collusion.* The plaintiffs present several instances that they allege to support inescapable conclusions that the restorations were collusively arranged. I have examined each of them and have not been impelled to any such conclusion. Two examples emphasized by the plaintiffs are summarized here.

(a) *The Jones Diary.* In 1970, Mr. C. R. Jones, of Mobil, kept a desk diary. The period from March 19 to the end of the month was blocked out to indicate vacation time. However, the "box" for the date of March 26 contains the notation of an announcement by Mobil of a restoration of .70 cents per gallon effective March 30, and the "box" for the latter date notes such an increase as being effective. (Tab. 73 of plaintiffs' exhibits for the hearing on the motions for summary judgment.)

The plaintiffs infer from the foregoing that Mr. Jones must have made the subject entries before he went on his vacation. They also draw a conclusion as to how he got his advance knowledge of the restoration: In about February of 1970, Mr. Jones' boss, a Mr. Bade, had attended a meeting of the American Petroleum Institute and had dined with a vice-president of marketing of Standard Oil Company of California. The plaintiffs draw the inference that ". . . the industry at the A.P.I. meeting agreed on this price increase and restoration that was going to happen and Mobil who was going to be the one on a nationwide basis to lead it. When Bade gets back, he tells Jones what is going to happen, Jones writes it in his calendar, and it takes place just

as organized." (Transcript of summary judgment hearing (The Transcript), page 122.) Mr. Jones, at his deposition, could recall nothing about the matter, nor could he identify the handwriting in the subject notations of his diary. It seems to me that the plaintiffs' inferences constitute speculations that are across the border into fantasy.

(b) *The Nerheim Alert.* A pricing clerk of Standard Oil Company made a handwritten memorandum, the first sentence of which the plaintiffs quote: "July 26, 1971 (for: 05 p.m.) AG Nerheim [Socal] called to inform us of the possibility of Shell returning to normal effective opening of business 7/27/71." (Plaintiffs' opposition memorandum, page 36.) However, the balance of the memorandum, which the plaintiffs do not mention, is highly significant. The second sentence reads: "Have field watched closely and report any movement to him." Apparently, this admonition was carried out, because there follows in the memorandum a list of twenty-eight individual gasoline stations with figures opposite each indicating its prices and the changes therein, most of which showed upward movement to about 39.9 cents per gallon. The remaining item shows a time of 1:30 p.m. and reports information received by the writer that his own company, Socal, had determined to withdraw its dealer allowances at 12:01 a.m. the next day. (Tab 13(a) of defendants' exihibits for hearing on summary judgment motions.)

We do not know where Mr. Nerheim got his information concerning Shell's impending move. As the plaintiffs point out (at paragraph 4-377 of their Pretrial Brief): "Shell dealers and jobbers would be informed of Shell's new prices the day before the public announcement and would be requested to change their prices accordingly." It may be that Mr. Nerheim saw a Shell dealer changing his price posting sign. In any event, the instruction to "have field watched closely" to see

what Shell was about to do, and the exhaustive manner in which the "field" carried out this instruction, tend to dispel any suggestion that a restoration had been agreed upon in advance by any two or more of the defendants.

3. *The "Impossibility" Of A Company Making A Restoration Independently.* The plaintiffs insist that the restorations made by the defendants must have been collusive, because it would be "impossible" for one company to do so alone. "Nobody can sit out there ten cents above the market without knowing that the other companies are going to go and follow you." (Transcript, page 31.)

Naturally, in a highly competitive market no company is going to increase its prices substantially unless it believes that its competitors will be ready to follow promptly, because of the potential loss of market share. But this does not mean that collusion is necessarily involved. The record shows that in several instances one of the defendants determined to "test the water" by instituting a partial or full restoration. It then carefully watched for the reactions of the other defendants. Sometimes they did not follow and, after a few days, the "would be" leader was obliged to restore the dealer's allowance.

4. *Mutual Socialization By Defendant Executives.* The plaintiffs assert that the defendants "used trade association meetings and other activities to exchange competitive information." (Plaintiffs' opposition brief, page 63.) They then refer to twenty-three paragraphs from their Initial Pretrial Brief in documentation of this assertion. Most of these references simply name the various employees of the respective defendants that were members and attended meetings of trade organizations such as the American Petroleum Institute. At these meetings they socialized with each other, and occasionally a paper

of mutual interest was presented or circulated. Perhaps the most sinister relevation (sic) was that "J.R. Horkey (NOJC) discussed market conditions with Frank Staub (Shell), marketing vice-president for Shell Oil, at the March 1972 NOJC meeting." (Plaintiffs' Pretrial Brief, paragraph 4-1217).

In *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), the opinion said:

> "Hanson's argument hinges on some documented meetings between Standard and Shell executives at an oil trade association meeting and at other times in San Francisco where their offices are located. When an illegal conspiracy or agreement to restrain trade is charged, there must be evidence from which actual agreement or a mutual consent can be found or inferred. *Esco Corp. v. United States*, 9 Cir., 1965, 340 F.2d 1000, 1007-08. Thus, evidence of meetings alone is not sufficient; there must also be evidence sufficient to permit the jury to infer illegal agreement."

Nowhere in the plaintiffs' briefs or exhibits is there any evidence that discloses a conversation between or among representatives of the defendants that was even remotely involved with price fixing.

5. *Testimony Of Individuals.* The plaintiffs appear to rely heavily upon the deposition testimony of Mr. Ken Anderson, who had been a regional manager for Amoco's dealer training program in an area that included Florida. He testified that from time to time, at the request of a sales representative of a defendant, he would call upon one of his own retail dealers that was pricing below market and urge him to increase his prices. He also said that he had asked representatives of competing companies to cause their "maverick" dealers to raise their prices to the market level. However, Mr. Anderson acknowledged that his direct participation in any of

these matters ended in 1967, which was well before the decision in *United States v. Container Corporation of America*, 393 U.S. 333 (1969) (see pages 19 and 20, *infra*). After 1967, Mr. Anderson's only knowledge about attempts to keep dealers in line came from what someone else told him. The remainder of his testimony consisted of several instances in which he overheard or was told directly that one of the defendants or "the majors" were raising their prices. In some of these instances we do not know the identity of the informant or the source of his information. Putting aside the very significant hearsay factor, the messages appear to have pertained to price increasing decisions that already had been made. As far as I can determine, Mr. Anderson has given no testimony that provides any competent factual support whatever to an inference of collusion in arriving at such decisions.

The last four sentences immediately above also apply to what Florida presents as being the testimony of Mr. Gervin and Mr. Cavin. This is true apart from the fact that both of these men now challenge the validity of the statements that Florida seeks to impute to them.

Another witness upon whom the plaintiffs relied initially is a Mr. Galligan, who has been exhaustively deposed. Most of his testimony is either irrelevant or immaterial to any issue here concerned; and most also is hearsay. Mr. Galligan did make allegations about a huge oil conspiracy, but the factual comments that might be considered pertinent are very general, fragmentary, uncertain as to time, and pertain principally to his relationships with independents. His conduct during his deposition in Florida was so unstable that, at the request of the parties, I sent a special master to preside. This move proved inadequate and, pursuant to a further request of counsel, I went, myself, in order to complete the deposition. Mr. Galligan's credibility has been challenged by every other relevant witness, including lead

counsel for Florida, the latter having expressed the intention not to use his testimony.

I do not know the present views of the plaintiffs concerning the help that they expect from Mr. Galligan, but it would be intolerable to require the parties to endure the burden of a trial on the strength of what this substantially discredited witness might have to say. *See Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 344 (9th Cir. 1983); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975).

B. *Conclusion Regarding Alleged Conspiracy To Have Simultaneous Restorations.*

The plaintiffs' chart pertaining to Los Angeles shows that between July 1971, the beginning of the period of limitations, and August 1972, when prices were stabilized by price controls, there occurred more than twenty separate price restorations. To accomplish restorations of this kind by means of conspiracy among so many companies would necessarily involve large numbers of people. It seems almost inevitable that there would be some documentary reference to at least one of these conspiratorial agreements, or that at least one witness would find himself obliged to acknowledge its existence. However, there is no sign of a paper trail pointing to a conspiracy, and the taking of more than four hundred depositions has failed to produce any testimony disclosing knowledge of collusive action in setting or changing wholesale prices.

On the contrary, there is voluminous evidence, through documents and depositions, that there was dynamic and vigorous competition among the defendants with respect to their sales of gasoline. The prices charged by the defendants did, indeed, remain similar, even in times of rapid change. However, the record shows that this is to be expected where, as here, the products are fungible and competition is intense. When prices were low, the defend-

ants watched each other carefully and with considerable uncertainty and anxiety in order to detect any upward movement. When one of them made a restoration, the others pondered for themselves whether or not to follow and made their determinations pursuant to their individual self-interests.

In *Matsushita Electric Industrial Co. Ltd., et al. v. Zenith Radio Corp., et al.*, —— U.S. ——, ——, 106 S.Ct. 1348, 1353 (1986), the Supreme Court reversed the Court of Appeals for having reversed Judge Becker's grant of summary judgment to the defendants, the opinion of the Court by Justice Powell stating: "The Court apparently did not consider whether it was as plausible to conclude that petitioners' price cutting behavior was independent and not conspiratorial." In this case, it is thoroughly plausible to conclude that the behavior of each of the defendants in fixing and changing their respective wholesale prices of gasoline was independent and not conspiratorial.

C. *Prompt Disclosure Of Restoration Decisions As Antitrust Violations.*

Thus far in this memorandum, I have written under the assumption that the defendants are charged with having conspired to act together in their restorations of tank wagon prices. As did the defendants, I have sought to understand and dispose of as many of the arguments submitted in support of such position as I reasonably could accomplish. However, on page 67 of their original brief in opposition to the defendants' summary judgment motions, the plaintiffs appear to recede from their initial contention:

> "Plaintiffs do not contend that restorations were prearranged among all defendants to occur at a specific time. Plaintiffs do contend that defendants had a communications network that allowed them to 'con-

> firm' each other's price changes in advance of uncertain field reports or published observations, so that full cooperation in the elimination of competition could be assured and so that defendants would know who if anyone was cheating on the restoration."

This apparently is an acknowledgement that the "leader" of a restoration did so pursuant to its own independent decision, and a claim that the antitrust conduct was in facilitating prompt knowledge of such action to all concerned, particularly the other defendants.

The plaintiffs rely greatly upon *United States v. Container Corp. of America*, 393 U.S. 333 (1969). That case found an antitrust violation in an agreement among competitors to furnish to each other, upon request, nonpublic information as to "the most recent price charged or quoted . . . whenever it was not available from another source." (393 U.S. at 335.) According to the concurring opinion of Justice Fortas, the exchange of such information had made it possible for individual defendants to submit bids to a particular customer that would quote the same price. Nothing in *Container* makes it illegal to publish a price change as soon as the decision has been made, and which inevitably, and before long, would become public knowledge.

A comment highly relevant to the present litigation is contained in the opinion of the Court by Justice Stone in *Maple Flooring Mfrs. Assoc. v. United States*, 268 U.S. 563, 582-584 (1925):

> "It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to . . . prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels, and to

> avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.
>
> * * * *
>
> [T]he Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information. Sellers of any commodity who guide the daily conduct of their business on the basis of market reports would hardly be deemed to be conspirators engaged in restraint of interstate commerce."

The opinion in *Container* distinguished *Maple Flooring* on its facts, but in no sense did it challenge the foregoing statement. In *United States v. United States Gypsum Co.*, 438 U.S. 422, 441, n. 16 (1978), reference was made to *Container* as being in harmony with the proposition that the exchange of price information is not necessarily anticompetitive and that in proper circumstances it can "increase economic efficiency and render markets more, rather than less, competitive." *See also Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1360 (9th Cir. 1976).

It seems to me that when one of the defendants was tired of a price war and decided to take a chance and raise its prices, it would be entitled to proclaim its decision immediately and loudly in the hope that the industry would follow promptly and not leave it alone in an above the market position. I also believe it to be in the other competitors' legitimate individual interests for them to learn of the upward move as soon as possible, in order that they might decide for themselves what action to take in light thereof. Nothing in the foregoing cases holds that, once a decision to increase a price has been made,

the interested parties are precluded from immediately announcing it or learning of it.

However, regardless of my own views in this respect, after the *Container* decision was rendered in 1969, the defendants became "gun shy" about exchanging pricing information among themselves. The plaintiffs have shown some hearsay documentation from which it can be inferred that in some instances a representative of a defendant informed or acknowledged directly to a representative of a competitor that the former's employer had decided upon a price change. However, the record is devoid of any evidence of a mutual plan or scheme or conspiracy that such information would be exchanged directly. The plaintiffs apparently recognize this lack, and they suggest, instead, that the defendants conspired to find less direct and more subtle ways of making sure that they learned promptly of an impending restoration.

1. *Use Of Dealers And Jobbers To Communicate Price Information.* The plaintiffs contend that "Defendants . . . used one another's dealers and jobbers to communicate price information." (Plaintiffs' brief in opposition, page 34.) It is true that the defendants usually informed their respective dealers of a price increase a day or two before the effective date. This practice was fully justified as a matter of courtesy to the dealers so that they could determine what adjustments to make in their retail prices and change their posted signs accordingly. The record also shows that representatives of competing defendants sometimes learned of the impending wholesale price changes by making inquiries of the dealers. However, there is no evidence of a systematic relaying of such information.

2. *Public Posting Of Current Prices.* Some of the defendants regularly posted their tank wagon prices; some did not. The plaintiffs' information is that Texaco, Gulf and Shell were in the latter category. (Plaintiffs' Pre-

trial Brief, paragraphs 4-260-262.) The defendants say that those who posted did so for the information of their employees and their customers, and as a means of assuring their dealers that "there was no discriminatory pricing." In addition, at least one defendant's representative acknowledged that a further reason for posting was that he "wanted the competition to know what the price move was." (Plaintiffs' Pretrial Brief, paragraph 4-295.) It seems obvious that each of these reasons for posting was in the legitimate individual interest of the poster.

3. *Use Of Press To Inform Of Price Moves.* The plaintiffs assert the "inference" that the "[T]rade press was used as a proxy or replacement for direct employee communications concerning future marketing and pricing plans." (Plaintiffs' Pretrial Brief, ¶ 4-698.) The petroleum trade press, particularly Platts' Oilgram, quite naturally was and is interested in current and prospective prices of gasoline. Its reporters were active in obtaining evidence of any restorations and made frequent inquiries of representatives of the defendants seeking information or confirmation concerning what they had learned or suspected. It also appears that, in the course of doing so, they occasionally volunteered information about impending price moves. However, there is no indication that the reporters were acting for or under the direction of the defendants, or any of them, as conduits for exchanges of information concerning price changes that were contemplated but not yet decided upon.

The defendants handled press inquiries in different ways. Some of the defendants regularly announced their prices publicly and informed the press accordingly; some authorized their employees to answer press inquiries concerning pricing decisions already made; others did not talk to the press at all.

4. *Posted Prices At Defendant Owned Gasoline Stations.* The plaintiffs headed one section of their initial Pretrial Brief (Section IV, A, 3, a, ii) with the assertion

that "The posting of retail prices at company operated service stations facilitated the conspirators' understanding of the retail price desired by the market leader and provided a means of visually signaling commitment to the agreed-upon retail prices, and verification of price moves." The paragraphs under that heading make two general assertions:

(a) The various defendants posted at their company owned stations the prices that they wanted their dealers to charge; and,

(b) The defendants kept track of each other's dealers' allowances by monitoring the prices posted at the company owned stations.

As to the first assertion, I do not see how a defendant could operate a retail gasoline station without posting the prices that it is charging. Certainly, the inference of independent action is overwhelming as compared to an inference of conspiracy. See the quotation from *Matsushita Electric Industrial Co. Ltd., et al., v. Zenith Radio Corp., et al.*, —— U.S. ——, ——, 106 S.Ct. 1348, 1357 (1986), which is set out at page 3 of this memorandum. The second assertion portrays active competition and contains no basis for an inference of conspiracy.

D. *Conclusion Regarding Prompt Disclosure Of Restorations.*

It was in the legitimate interest of each defendant that knowledge of its price increases, once determined upon, reach its competitors promptly. In any event, there is no evidence of a mutual agreement by the defendants to exchange such information, directly or indirectly, in advance of its availability to the public. Any steps taken by a defendant to announce its price changes were accomplished in ways that it determined to be in its individual self interest.

E. *Florida's Contentions Regarding Price Fixing.*

Florida's memoranda and oral arguments at the hearing for the most part "track" those of the other plaintiffs. Florida does add many summaries of depositions, all of which I have examined. I think it fair to characterize such material as something of a hodgepodge, which neither individually nor collectively constitutes admissible evidence indicating a conspiracy on the part of the defendants to fix prices. Much of the testimony consists of hearsay statements reporting that the dealers' allowances by one or more of the defendants "had been or were going to be withdrawn." I believe that in none of these instances do we know the ultimate source of such information, and the likelihood is that it pertains to restorations already decided upon and perhaps even announced. There is no indication of collusion in arriving at a decision by a particular defendant to restore, or of any mutual determination in advance that others would follow.

There is testimony about efforts to persuade the "independents" to stabilize their prices upward. Most of the deponents could only place these efforts to have occurred sometime between 1966 and 1978, and Florida's principal witness in this area, Mr. Gervin, contended that his last contact with the "majors" was in 1969. Florida carefully has sought to blur the distinction between pre-*Container* (1969) and post-*Container* events, and to place the "evidence" upon which it relies within the latter period. A rather disturbing example of such efforts involved the testimony of Mr. Roy Graham, who was a retail service station supervisor for an independent marketer. Florida undertakes to quote his testimony concerning telephone conversations that he had with a Mr. Dervaes, who apparently was affiliated with one of the other independents. According to Mr. Graham, the two men in these conversations would ask each other to help in getting the independents to increase their prices. (See Florida's General Response to Defendants' Summary

Judgment Motions on Price-fixing and Conspiracy, pages 19-20.) At the top of page 20, Florida sets out a question and answer as follows:

> "Q I believe you said that Mr. Dervaes called you on occasions during the *1973 time period*; is that correct?
>
> A Yes." (Emphasis supplied.)

However, at the oral argument, defense counsel pointed out that the transcript of Mr. Graham's deposition reads:

> "Q I believe you said that Mr. Dervaes called you on occasions during the *1968 to 1973 time period*; is that correct?
>
> A Yes." (Emphasis supplied.)

Florida's distortion of the record was compounded at the oral argument when its counsel said ". . . and I would like to correct Mr. Destino [counsel for one of the defendants] here [!!]. It is quite clear—we went back and checked on pages 85-87 of the Graham testimony. It says 1968 to 1973 time period that the man is talking about." (Transcript pages 599-600.) This assertion must be compared with Mr. Graham's testimony that he could not recall having had any conversation with Mr. Dervaes after 1969. (Graham deposition transcript page 115.)

In another troubling example, Florida summarizes testimony of Mr. Winn Hobbs, a Phillips employee:

> "Hobbs testified further that although the executive director of the Florida Petroleum Council advised the members not to discuss prices at the meetings, to his recollection *Sun was the only company that would not discuss prices.*" (Florida memorandum, page 44.) (Emphasis supplied.)

I have read all of the portions of the deposition of Mr. Hobbs that Florida listed as being the bases for the above

assertion. Nowhere therein was there any reference to Sun being the only company that would not discuss prices. In fact, at page 95 of the transcript of Mr. Hobbs' deposition, the following appears:

> "A. What I was trying to point out to this gentleman that interviewed me was that at these meetings price, which no company representative was discussed [sic], nor was it on the agenda. And I tried to emphasize by making the comment that Sun had a record that they wouldn't talk to anybody. They—I'm merely trying to put over to this gentleman that at these meetings in no way was price discussed. And I merely used Sun as an example. There were some others that were the same way. Just everybody. We didn't discuss price in these meetings. We didn't discuss price anywhere in these meetings."

As is indicated above, I have found nothing in Florida's voluminous brief that gives substantial support to its contention of conspiracy by the defendants to raise prices. But even if there is something that I have missed, the foregoing examples raise a grave question as to the credence that may be given to the statements contained in Florida's memorandum.

II. THE ALLEGED CONSPIRACY TO CREATE SHORTAGES OF PETROLEUM PRODUCTS

The plaintiffs contend that in 1972 and 1973 the defendants conspired to contrive a nationwide shortage of petroleum products. The alleged purpose of such shortage was to enable them to stop selling to the independents, and thus end the price wars. According to the plaintiffs, the defendants agreed to accomplish the shortage by reducing their respective domestic productions of crude oil, curtail their plans for building additional refining capacity, make unnecessary allocations of inventories and production that would eliminate sales to independents, and

hold down production of crude oil in Iran and Saudi Arabia. The evidence presented to the court in support of and in opposition to these contentions is summarized below.

A. *Suggestions To Hold Down Production And Refining Capacity.*

In 1970 and 1971 several of the defendants had more crude oil production and refining capacity than they needed in order to supply gasoline to their regular customers and company owned stations. They accordingly sold the "surplus" to independents. The files of several of the defendants contained in-house memoranda that expressed dissatisfaction with the practice by their respective employers of producing so much gasoline that they were obliged to sell the surplus to independents, who, in return, competed with the sellers at reduced prices. As the plaintiffs pointed out in their Initial Pretrial Brief (¶ 8-200), "Gulf management observed in October 1971 that 'an alternative to selling surplus gasoline is not making it, which might be a wiser course.' " Employees of another defendant proposed to management that the company postpone expanding its refining capacity until a need therefor had been observed for two years. In the meantime, any requirement for more oil or more refining capacity could be fulfilled by purchase and by entering into processing agreements with other companies.

B. *Other Factors That Discouraged The Building Of New Refineries.*

Lack of enthusiasm for producing gasoline that would be sold to price cutting independents was not the only factor that discouraged refinery expansion:

1. The costs of building a refinery were increasing rapidly.

2. A site for a refinery was difficult to find, because of environmental considerations and the litigation seeking to enjoin construction that such considerations inspired.

3. Uncertainty as to the continued availability of crude oil from domestic, Alaskan, and foreign production raised questions in 1971 and 1972 as to the need for additional refining capacity.

4. Price controls reduced the profitability of sales of oil products and tended to discourage expansion.

C. *Production Of Crude Oil In the Middle East.*

Some of the defendants, with the approval of the Government of the United States, participated in joint ventures to produce crude oil in Iran and in Saudi Arabia. For reasons set out in a memorandum of decision filed March 2, 1982, I held that the fact that some of the defendants entered into these consortiums did not provide support for this antitrust action. I did, however, allow the plaintiffs some further discovery in order that they might "make reasonable inquiry as to whether the limits on oil production in Iran and Saudi Arabia stemmed from . . . anticompetitive agreements to increase prices in the United States by holding down imports from those countries." (Memorandum of Decision, March 2, 1982, pages 10-11.) Nothing subsequently has been called to my attention that would indicate that there were any such "anticompetitive agreements." In fact, at the hearing on the motions here concerned the plaintiffs' counsel took the position that it makes no difference whether any less than maximum production of Middle East oil stemmed from an antitrust conspiracy to create a shortage or occurred simply because the participating defendant producers guessed wrong as to their needs. According to the plaintiffs' counsel, the defendants "were acting in a cartel and . . . the cartel did not produce the output that was necessary," and liability therefore follows. (Transcript page 241.)

This court cannot accept such a contention. It now appears beyond dispute that the operations under both consortiums were in accord with the agreements approved by the Attorney General of the United States. Under such circumstances, as I said in the Memorandum of March 2, 1982, at page 7, "I cannot conceive of this court allowing them [the consortiums] to form a basis for recovery in the present legal actions."

D. *The Onset Of The Shortage And Some Reasons Therefor.*

In the latter part of 1972 and throughout most of 1973, there was, indeed, a shortage of gasoline in this country. There are several reasons for such shortage apart from anything that the defendants may or may not have done:

1. The economy of the country was healthy and people were driving more.

2. Increasing numbers of autos had air conditioning and "power" operated equipment, which increased gasoline consumption.

3. Antipollution requirements obliged automobile engines to accept low-lead gasoline, which reduced substantially the miles per gallon that the engines could accomplish.

4. The winter of 1972-73 was unusually severe, requiring diversion of production from gasoline to fuel oil.

5. Although, as noted above, price controls tended to discourage increases in supply, the resulting lower prices enhanced demand.

E. *The Responsibility Of The Defendants For The Shortage.*

It is obvious that another reason for the shoratge was the failure of the defendants to anticipate the increased demand for gasoline in 1972 and 1973 and to prepare ade-

quately to meet it. However, a considerable amount of time is necessarily involved between a decision that a new refinery is needed and bringing it on stream, and the evidence points up the difficulty in striking a balance between too much production and not enough. The evidence submitted also shows quite clearly that whatever the defendants did or did not do stemmed from individual decisions rather than conspiracy.

There is no indication of a mutual agreement to create a shortage of gasoline or to freeze out the independent dealers. Some of the defendants built new refineries, others enlarged existing refineries, and still others did close certain refineries. The plaintiffs acknowledge in their Initial Pretrial Brief (¶¶ 7-1 and 7-2) that by August 1972 U.S. production had reached its peak. Thereafter, production steadily increased. According to the Bureau of Mines, overall production in each month of 1972 substantially exceeded production during the corresponding month of the prior year, except for November and December, when the Arab oil embargo was in effect.

The plaintiffs assert that statistics that show constantly increasing production "prove nothing if these expansion programs were collusively geared to lag behind increased demand or were altered in defendants' common interest." (Plaintiffs' Brief in Opposition, page 139.) The problem for the plaintiffs is that they have presented no creditable evidence to show any such collusion.

During the period of shortage, some of the defendants continued to serve the independents with whom they had been dealing; others curtailed or discontinued sales to independents. But, here again, as far as can be determined from the submissions made, whatever was done stemmed from individual decision and was without any reference to what others were doing.

E. *Conclusion Regarding Alleged Conspiracy To Create Shortages Of Petroleum Products.*

The shortage in 1972 and 1973 was real. It was caused principally by increased demands for gasoline, which were beyond the control of the defendants. It also was caused by the understandable failure of the defendants to anticipate the increased demands and prepare to meet them before shortages occurred. Whatever the causal relationships that any of the defendants may have had with the shortages, they stemmed from individual action or lack of action and not from any conspiracy.

III. THE ALLEGED CONSPIRACY NOT TO COMPETE IN BIDDING FOR CONTRACTS WITH STATES AND THEIR GOVERNMENTAL SUBDIVISIONS

The plaintiffs charge that the defendants entered into a conspiracy under which they would refrain from competing with each other for contracts for the sale of petroleum products to the plaintiff States and their subdivisions. Little need be said in disposing of this contention. The plaintiffs cite no evidence, either oral or written, of a communication between any defendant's employee and any competitor relating to bid practices.

The record shows instances in which one defendant did bid successfully to supplant another in selling to an agency of a plaintiff State. On other occasions, a defendant did not seek a contract because State bid specifications made it ineligible. In still other instances, a defendant did not bid because, for one reason or another, it found the potential contract not to be desirable to it. But the plaintiffs have shown no pattern of a failure to bid from which a conspiracy can be inferred, particularly in light of the many reasons why contracts to sell to State entities are of marginal desirability, as the plaintiffs have acknowledged.

IV. CONCLUSION

From the outset of this litigation, instances have occurred that have caused me to wonder how the plaintiffs were going to prove their case. In the course of the years that followed, my concern gradually shifted toward the question of whether the plaintiffs were developing evidence with which they *could* prove their case. And now, after more than ten years and great expenditure of effort and money by all concerned, it has become evident that the plaintiffs simply cannot establish any part of the conspiracy that they allege. All that the plaintiffs present are the self serving inferences drawn from facts that are far from compelling a conclusion of conspiracy. Such facts are at least as consistent with a finding of individual action and vigorous competition. Under the teachings of *Zenith* (see pages 2-3 hereof), summary judgment is required and accordingly will be granted to the defendants.

DATED: November 25, 1986.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6776
MDL Docket No. 150-WPG

IN RE COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

No. 86-6779
USDC No. CV-76-3247-WPG

STATE OF ARIZONA,
Plaintiff-Appellant,

v.

STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; MOBIL OIL CORP.; and SHELL OIL CO.,
Defendants-Appellees,

and

CONTINENTAL OIL CO.; GULF OIL CORP.; PHILLIPS PETROLEUM CO.; CARIBOU FOUR CORNERS, INC.; and POWERINE OIL CO.,
Defendants.

No. 86-6780
USDC No. CV-76-2839-WPG

STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; EXXON CORP.; GULF OIL CORP.; MOBIL OIL CORP.; and SHELL OIL CO.,
Defendants-Appellees,

and

ATLANTIC RICHFIELD CO.; GETTY OIL CO.; and PHILLIPS PETROLEUM CO.,
Defendants.

No. 86-6783
USDC No. CV-77-0615-WPG

STATE OF OREGON, on behalf of itself, its residents and all political subdivisions within the State similarly situated,
Plaintiff-Appellant,

v.

STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; MOBIL OIL CORP.; and SHELL OIL CO.,
Defendants-Appellees,

and

GETTY OIL CO.; GULF OIL CORP.; and PHILLIPS PETROLEUM CO.,
Defendants.

No. 86-6784
USDC No. CV-77-3487-WPG

STATE OF WASHINGTON, on behalf of itself and its public entities and residents,
Plaintiff-Appellant,

v.

STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; GULF OIL CORP.; MOBIL OIL CORP.; and SHELL OIL CO.,
Defendants-Appellees,

and

GETTY OIL CO.; and PHILLIPS PETROLEUM CO.,
Defendants.

ORDER

[Filed Jan. 8, 1991]

Before: WALLACE, D.W. NELSON and REINHARDT, Circuit Judges.

The panel as constituted in this case voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court was advised of the suggestion for a rehearing en banc, and no judge of the court requested a vote on the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 (WPG)

ALL STATE CASES

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

SUMMARY JUDGMENT

The defendants in these combined actions have moved for summary judgment. For reasons set forth in a Memorandum of Decision filed this date, such motions are granted.

Summary judgment accordingly is awarded to the respective defendants in each of the combined cases, the plaintiffs shall take nothing by their respective actions, and the defendants are awarded their costs.

DATED: November 25, 1986.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX E

LIST OF PARTIES PURSUANT TO RULE 29.1

EXXON CORPORATION

*Affiliates and Subsidiaries—Not Wholly-Owned**

AGA Progas a s
AT&S Exploration Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Aromatics (Thailand) Company Limited, The
Asakawa Sekiyu K.K.
Associated Oil Company (Kyneton) Pty. Ltd.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited

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* Does not include companies with less than 5% Exxon Ownership.

Bel-Air Entreposage S. A.
Brickwood Holdings Pty. Ltd.
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited
Canadian Reserve Oil & Gas Ltd.
Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Compagnie Industrielle des Polyethylenes de Normandie, GIE (CIPEN)
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliarie de Petrole
Comptoir Oxonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dukhan Service Company
ERC Malaysia Inc.

E S F Limited
Eagle Kenso K.K.
East Texas Salt Water Disposal Company
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel and Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.bH.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Esso Canada (A limited partnership)
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Lub'Services
Esso Malaysia Barhad
Esso Northwest Territories (an Ontario Limited Partnership)
Esso of Canada Limited
ESSO OIL Tankstellen Gesellschaft m.b.H.
Esso Resources Canada an Alberta limited partnership
Esso Resources Canada Limited
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)
Establissements Cloarec
Exxon Chemical Pakistan Limited
Exxon Chemical Polymeres SNC
Exxon Supply Company

F. T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnug Erdgas und Erodel GmbH
Gewerkschaft Kuechenberg Erdgas under Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Groupement d'Exploitation du Depot de Reception de Chennevieres (G.E.D.R.C.)
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-deOMarne (G.P.V.H.)
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sakiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha

Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydrant Refuelling System, S.A.
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario Partnership)
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Intamix Corporation
Intoplane Service Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
JAYMO SNC
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Chubu Toresen
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Ito
K.K. Kanagwa Sekiyu Shokai
K.K. Kyoei Agency
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service

K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihan Sekiyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E. P. Rubber Co., Ltd.
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kyushu Eagle K.K.
L12a (Groep) B.V.
L12b/L15b (Groep) B.V.
L15a (Groep) B.V.
LEAG Aktiengesellschaft feur luzernisches Erdoel
Les Docks des Petroles d'Ambes
Lilac Sekiyu Kabushiki Kaisha
Long Beach Oil Development Company

Maasvlakte Coal Terminal B.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Malaysian Energy Chemical & Service Sdn Bhd
Maple Leaf Petroleum Limited
Maruei Gas K.K.
Maruei Service K.K.
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschreankter Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Multi Tank Card B.V.
Mytex Polymers Incorporated
923726 Ontario Limited
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM—K17 B.V.
NAM/CLOMS—K 8/K 11 B.V.
NAM/CLOMS—L 13 B.V.
NAM/MOBIL M/9a B.V.
NPC Services, Inc.
N. V. Nederlandse Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha

Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichiel Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Nogat B.V.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Noroxo
Northward Developments Ltd.
Nottingham Gas Limited
107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
160440 Canada Limited
160837 Canada Limited
165548 Canada Limited
165549 Canada Limited
165550 Canada Limited
165899 Canada Limited
168211 Canada Limited
172204 Canada Limited
172965 Canada Limited
173097 Canada Limited
173117 Canada Limited
173150 Canada Limited
175446 Canada Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.

Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oilship Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
Oleductos Canarios, S.A.
Osaka Ashyu Nenryou K.K.
Osaka Sekiyu Gas Yuso K.K.
OSLO Alberta Limited
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pioneer Kosan Kabushiki Kaisha
Pipe Line Services, Inc.
Plantation Pipe Line Company
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
S.A.R.L. Viain
Saitama Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited

Schubert KG
SEAG Aktiengeseilschaft fuer schweizerisches Erdoel
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K. K.
Sigel Incorporation
Smiley Gas Conservation Limited
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societa Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagasgar"—PROLUMA, S.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dachets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere "Kleber-Etoile"
Societe de la Raffinerie d'Alger
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S. A.
Societe de Promotion de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transport Petroliers par Pipe Line
Societe d'Etude te d'Exploitation de la Raffinerie du Tchad—S.E.E.R.A.T.

Societe d'Exploitation & de Developpement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S. A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport Gesellschaft mit beschraenkter Haftung
Sun East Company Ltd.
Superior Disk Corporation
Syncrude Canada Ltd.
Synergistics Industries Limited
204383 Enterprises Limited
369772 Alberta Inc.
393193 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TGF Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taihei Bussan K.K.
Taisei Kogyo Sekiyu Hanbai K.K.

Takahama Kosan Kabushiki Kaisha
Taketsuru Yugyo K.K.
Tankanlage A. G. Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C. V.
Tecumseh Gas Storage Limited
Thai Aliphatics Company Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Energy International Corp.
Tonen Kabushiki Kaisha
Tonen Kagaku Kabushiki Kaisha
Tonen Properties Inc.
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K. K.
Tonex Company Limited
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Northern Pipelines Inc.
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited

UBAG—Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
Ulan Coal Shippers Pty. Limited
United Industry Development Co., Ltd.
Van Salt Water Disposal Company
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdeutsche Erdoelleitungs—G.m.b.H.
Westgas G.m.b.H.
Winnipeg Pipe Line Company Limited
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.

TEXACO INC.

Affiliated Corporate Entities

Four Star Oil and Gas Company
Texaco Cogeneration Company
Texaco Pipeline Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Refining and Marketing (East) Inc.
Texaco TPC Inc.
Texaco Trading and Transportation Inc.
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.—Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Overseas (Nigeria) Petroleum Company
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Puerto Rico Inc.
Texas Petroleum Company
Getty Oil Company
Texaco Chemical Company
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
TRMI Holdings Inc.

ATLANTIC RICHFIELD COMPANY

Non-Wholly Owned Subsidiaries and Affiliates

AA Antilles Coal NV
AAPSS90, Inc.
AAPSS91, Inc.
AAPSS92, Inc.
AAPSS93, Inc.
AAPSS94, Inc.
Agro Internacional, S. de R. L. de C.V.
Alyeska Pipeline Service Company
ARCO Centennial Corp.
ARCO Channelview, Inc.
ARCO Chemical Asia Pacific, Ltd
ARCO Chemical Australia Pty Limited
ARCO Chemical Canada Inc.
ARCO Chemical China, Limited
ARCO Chemical Company Philadelphia, Inc.
ARCO Chemical Delaware Company
ARCO Chemical (Deutschland) GmbH
ARCO Chemical Eastern Europe Gesellschaft m.b.H.
ARCO Chemical Espana Co.
ARCO Chemical Europe, Inc.
ARCO Chemical (Europe) Inc.
ARCO Chemical Export Sales Company
ARCO Chemical Foreign Sales Corp.
ARCO Chemical Holding Company
ARCO Chemical Indonesia, Inc.
ARCO Chemical International Co.
ARCO Chemical Japan, Inc.
ARCO Chemical Korea, Inc.
ARCO Chemical Korea WV-Polyols Company
ARCO Chemical Leasing Company
ARCO Chemical (Malaysia) Sdn. Bhd.
ARCO Chemical Middle East, Inc.
ARCO Chemical New Zealand, Inc.
ARCO Chemical Overseas Services, Inc.

ARCO Chemical Pan America, Inc.
ARCO Chemical (Philippines) Inc.
ARCO Chemical Polyols Company
ARCO Chemical Products Europe, Inc.
ARCO Chemical Puerto Rico, Inc.
ARCO Chemical Recycling, Inc.
ARCO Chemical (Singapore) PTE, Ltd.
ARCO Chemical Taiwan, Inc.
ARCO Chemical Technology, Inc.
ARCO Chemical (Thailand) Limited
ARCO Chemical Trading, Inc.
ARCO Chemical Waste Management, Inc.
ARCO Chemie Nederland, Ltd.
ARCO Chemie Technologie Nederland B.V.
ARCO Chimie France Corporation
ARCO Chimie France S.N.C.
ARCO Elastomers, Inc.
ARCO France, Inc.
ARCO/JSP Company
ARCO Lyondell, Inc.
ARCO Lyondell Licensing, Inc.
ARCO Mont Belvieu Corporation
ARCO Quimica do Braxil, Ltda.
ARCO Solar Nigeria Ltd.
ARCO Synthesis, Inc.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Carbones Del Guasare, S.A.
Chiunglong Petrochemical Co., Ltd.
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Cook Inlet Pipe Line Company
Dalrymple Bay Coal Terminal Pty Ltd
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
85819 Canada Limited
EnArco Resins S.p.A.

Guasare Coal International N.V.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Capital Corp.
Kuparuk Transportation Company
Lyondell Petrochemical Company
Lyondell Petrochemical de Mexico, Inc.
Lyondell Polymers Corporation
N. T. Development, Inc.
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
Oxirane Chemical Company
Oxirane Technology (Japan) Company
P. T. Gema Polytana Kimia
Platte Pipe Line Company
POSM Delaware, Inc.
POSM II Limited Partnership, L.P.
POSM II Properties Partnership
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
West Properties, Inc.
Yukong ARCO Chemical Ltd.

CHEVRON CORPORATION

The following are non-wholly-owned subsidiaries of Chevron Corporation, none of which have issued shares to the public:

Chevron do Brasil Participacoes e Empreendimentos Ltda.
Compania Commercial Conchan S.A.
Cornwallis Artic Oils Limited
Crest Exploration Limited
Refineria Petrolera de Guatemala-California, Inc.

In addition, wholly-owned subsidiaries of Chevron have an ownership interest in the following publicly-traded companies:

Canyon Reef Carriers, Inc.
Felix Oil Company
Horizon Gold Corporation

SHELL OIL COMPANY

All of Shell Oil Company's common stock is owned by Shell Petroleum Inc., a Delaware corporation. The voting shares of Shell Petroleum Inc. are held by two publicly owned corporations, 60 percent by Royal Dutch Petroleum Company and 40 percent by The "Shell" Transport and Trading Company, p.l.c. Shell Oil Company also wholly owns directly or indirectly a number of companies. The following companies are affiliated with Shell Oil Company but are not wholly owned subsidiaries:

Fractionation Research, Inc.
GRAVCAP, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
Lucky Chance Mining Company, Inc.
Mesbic Financial Corporation of Houston
Agripro Biosciences Inc.
Oil Companies Institute for Marine Pollution Comp
Oil Insurance Limited
Pecten Middle East Services Company
Saudi Petrochemical Company
CRI International, Inc.
CRI Far East Trading Company Limited
CRI Europe S.A.
Catalyst Recovery Europe S.A.
CRI-SAM, Ltd.
CRI Ventures, Inc.
Nippon CRI, LTD.
Criterion Catalyst Company
Pecten Portugal Company S.A.R.L.
Pecten Cameroon Company
Al Furat Petroleum Company
Taranaki Offshore Petroleum Company Limited
Columbia LNG Corporation
East Texas Salt Water Disposal Company
Grande Ecaille Land Company, Inc.

Cortez Capital Corporation
Van Salt Water Dispostal Company
Wyoming Industrial Development Corporation
Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
Locap Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Premix/E.M.S. Inc.
United Scientific Incorporation

MOBIL OIL CORPORATION

ABORAY PTY LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN CHEMICAL TERMINALS
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN SHIPPING & TRADING CO. S.A.
ARABIAN TRADING CO. S.A.
ARAL AKTIENGESELLSCHAFT
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO LIMITED
AUTOBAHN-BETRIEBE GESELLSCHAFT MBH
AVIATION FUEL SERVICES LIMITED
AYGAZ A.S
BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE AG
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG
BIN SULAIMAN MOBIL TOWERS

BRICKWOOD HOLDINGS PTY LTD.
BUFFALO RIVER IMPROVEMENT CORPORATION
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY, INC.
CANYON REEF CARRIERS, INC.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA SA
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE
COMPAGNIE DES PETROLES PRIMAGAZ
COMPAGNIE REGIONALE DE DISTRIBUTION DE PRODUITS PETROLIERS (CO.RE.DIS)
COMPAGNIE RHENANE DE RAFFINAGE-CAR
COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE LIMITADA (COPEC MOBIL LTDA.)
COMPANIA MEXICANA DE ESPECIALIDADES INDUSTRIALES, S.A. DE C.V.
CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
CORCOP
CRC LYON CHAUFFAGE
CRCP
CYPRUS PETROLEUM REFINERY LIMITED

DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DIXIE PIPELINE COMPANY
DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENERGIE ALPES
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GESELLSCHAFT MBH
ERDOEL-RAFFINERIE NEUSTADT GMBH & CO. OHG
ERDOL-LAGERGESELLSCHAFT M.B.H.
ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS ROHRMANN DUPOSSE
ESTABLISSEMENTS STARCH & CIE
ESTACIONES DE SERVICIO ML, SA.
FAIRWIND MARITIME COMPANY S.A.
FAVANG AUTOVERKSVED
FELIX OIL COMPANY
FIBIL SA
FILTROS DE COSTA RICA, S.A.
FIOUL ASSISTANCE SERVICE
FRUEHMESSER GMBH
FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED

GUZZARDI PETROLEUM (GIPPSLAND) PTY. LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HIBERNIA MANAGEMENT & DEVELOPMENT COMPANY, LTD.
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUHAGEN/FRANKFURT
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED
IRAQ PETROLEUM PENSIONS LIMITED
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP
JET AVIATION SAUDI ARABIA COMPANY LIMITED
K.K. NIPPATSU
K.K. SANKYO PLASTICS
K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
KEIYO SEA-BERTH COMPANY, LTD.
KELINDA PTY LIMITED
KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG
KUMOSAR S.R.L.
KURT AMMENN GMBH & CO. KG
KYGNUS EKKA GAS KABUSHIKI KAISHA
KYGNUS KOSAN KABUSHIKI KAISHA
KYGNUS MARKETING SERVICE K.K.

KYGNUS SEKIYU KABUSHIKI KAISHA
KYGNUS SEKIYU SEISEI KABUSHIKI KAISHA
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LES NOUVEAUX COMPTOIRS PETROLIERS
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
LUBLEND LIMITED
LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MEI FOO PTYS, LTD.
MERTL GMBH
MID STATE PETROLEUM PTY LIMITED
MINERALOEL-HANDELS-GESELLSCHAFT MBH
MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL CORPORATION (Parent)
MOBIL KOREA LUBE OIL, INC.
MOBIL MOTOR REST SA
MOBIL OIL—AFOR KERESKEDELMIKFT
MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL GUAM
MOBIL OIL MAROC
MOBIL OIL NIGERIA LIMITED
MOBIL POLYMERS INTERNATIONAL SARL
MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOGESTE-GESTAO DE POSTOS DE ABASTECIMENTO, LTD.
MOTEL REST SA
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
MULTI-TANK CARD B.V.
N.V. ROTTERDAM-RIJN PIJPLEIDING MAATSCHAPPIJ

N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NAKAJIMA COSAN KABUSHIKI KASISHA
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
NEW ZEALAND SYNTHETIC FUELS CORPORATION LIMITED
NICHIMO OIL (BERMUDA) CO., LTD.
NIPPON UNICAR COMPANY, LIMITED
NORDDEUTSCHE ERDGAS-AUFBEREITUNGS-GESELLSCHAFT MBH
NORVAC PTY. LIMITED
NOTTINGHAM GAS LIMITED
NOVODIS
OLDENBURGISCHE ERDOEL GESELLSCHAFT MBH
OLJEFORSYNING OFASAS
OVENS & MURRAY PETROLEUM PTY, LTD.
P.T. ARUN NATURAL GAS LIQUEFACTION COMPANY
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Union Exploration Corporation
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Supreme Court, U.S.
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No. 90-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHEVRON CORPORATION, et al.,
Petitioners,

vs.

STATE OF ARIZONA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Respondents contend that the Court of Appeals' decision raises no questions that merit certiorari review.

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No. 90-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHEVRON CORPORATION, et al.,
Petitioners,

VS.

STATE OF ARIZONA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit.[1]

STATEMENT OF THE CASE

Procedural Background. Respondents, the States of Arizona, California, Oregon and Washington, filed their complaints in these actions between June 1975 and August 1977, alleging several violations of the Sherman Act, 15 U.S.C. § 1 *et seq.* The states alleged that the petitioner oil companies conspired: 1) to raise or stabilize prices for refined petroleum products, in part by engaging in a continual and mutual exchange of pricing and price-related information; 2) to create by various means an artificial scarcity of refined petroleum products in the western United

[1] *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* (9th Cir. 1990) 906 F.2d 432, *reversing* 656 F.Supp. 1296 (C.D. Cal. 1986).

States; and 3) to raise the price of petroleum products sold in bulk to public entities. App. A at 4a.[2]

Several years of extensive discovery culminated in January 1983 with the states filing a three volume pretrial brief with later supplements ("Plaintiffs' Initial Pretrial Brief" or "PIPB"), presenting certain evidence and analyzing what that evidence would prove. In July 1983, the oil companies moved for summary judgment, arguing that the evidence contained in PIPB failed to raise a triable issue of antitrust conspiracy. On November 25, 1986, the district court filed an opinion and order granting summary judgment and dismissing the cases. App. A at 4a-5a.

The appeals were argued on July 15, 1988, and the Court of Appeals rendered its decision and opinion on June 22, 1990. App. A at 3a. On January 8, 1991, the Court of Appeals denied the oil companies' petition for rehearing, and rejected the suggestion for a rehearing en banc. App. C at 99a. On February 7, 1991, the court denied petitioners' motion for a stay pending determination of this Petition.

The Record Before the Court of Appeals. Petitioners are major oil companies that, among other things, produce crude oil and manufacture it into gasoline and other refined products. These oil companies distribute refined products through: 1) franchised service station dealers selling one particular brand of gasoline and products; 2) company-owned and operated branded stations who sold in competition with all brands and franchised dealers; 3) independent "jobbers" or brokers who resold gasoline to various service stations and others who purchased in bulk; and 4) government and other entities who purchased under bulk sales contracts. App. A at 5a.

The franchised branded dealers could obtain their supplies of gasoline from only their particular franchisor. Each company sold gasoline to its franchised dealers at a price known as the "dealer tankwagon price." "In actuality, the official tankwagon prices

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[2] In this Opposition, citations to the decisions of the courts below will be made to the Appendix accompanying the Petition for Writ of Certiorari.

were only occasionally changed; fluctuations in the cost of gasoline to franchised dealers were more frequently reflected in changes to the applicable discounts from the tankwagon price. These discounts were variously known as 'temporary dealer assistance,' 'dealer aid,' or simply 'discounts.' " App. A at 5a.

By setting the applicable discount from the tankwagon price at which gasoline was supplied to branded dealers, the oil companies could determine the retail price of gasoline. The result of this market structure, in which franchised dealers were not free to shop for their supplies, was that each oil company was able to exercise effective control over the retail price at which its franchised dealers sold its gasoline. App. A at 6a. Thus, petitioners' activities coordinating dealer discounts from the tankwagon price were a means of raising and stabilizing the retail price of gasoline, as the states charged. App. A at 6a.

The record before the Court of Appeals included direct and circumstantial evidence. The states presented evidence that prices at petitioners' branded stations moved up in tandem. For years when gasoline "price wars" were part of the everyday vocabulary, retail prices declined over a period of weeks and then experienced especially steep increases, or "restorations." The court found that the sharp price increases resulted from virtually simultaneous oil company action withdrawing dealer discounts. App. A at 16a. This parallel pricing pattern, the court noted, was not accompanied by any proof of market concentration making the price cycle evidence, standing alone, proof of an antitrust violation. App. A at 21a.

The court then considered evidence of the oil companies' practice of disseminating tankwagon and retail prices. App. A at 23a. The oil companies publicized by various means changes in the tankwagon price and the amount of dealer discounts. App. A at 23a-33a. There was substantial testimony from oil company personnel that the purpose of publishing price changes, in some instances giving each other advance notice, was the hope that other companies would quickly match the price increases. App. A at 24a. The Court of Appeals found that in the oil companies' branded franchising system, in which the dealers were not free to shop around for supply, the publication of tankwagon prices

"served little purpose other than to facilitate interdependent or collusive price coordination." App. A at 29a.

There was substantial evidence that the oil companies had personal and telephone contacts about tankwagon prices and dealer discounts. App. A at 33a-45a. Moreover, there was *direct* evidence of oil company contacts with unbranded independent marketers for the purpose of coordinating price changes among major oil companies such as petitioners and independent marketers. App. A at 45a-54a. The oil companies' exchange of price information "was done with the purpose and effect of allowing greater coordination and stabilization of prices" and supported the inference of an agreement to stabilize prices. App. A at 38a, 39a, and 45a. The court held that the direct evidence of price coordination among major brands and independent marketers in itself created a genuine issue of material fact, and was not to be analyzed under rules concerning summary judgment on a record wholly composed of circumstantial evidence. App. A at 54a, n.22.

In the early 1970s the oil companies had identified a leading cause of the price war cycles as excess production. The companies' own documents recognized that eliminating "excess" production was a "good thought—how accomplish short of collusion." App. A at 55a. The oil companies agreed to exchange information about actual production levels, expected future demand, and projected supplies. App. A at 56a-59a. Petitioners proffered explanations that the ensuing shortages were real. In turn, the states offered proof that the oil companies deliberately chose not to expand capacity and took steps to reduce excess capacity to contrive a shortage. App. A at 58a-59a.

In this specific context that "[c]hanges in refinery capacity are not readily reversible," the Court of Appeals found that an agreement to exchange supply and demand forecasts facilitated "mutual decelerations of increases in production capacity." App. A at 61a. The court held that the combination of the oil companies' actions and intent, among other evidence concerning the states' contrived shortage allegations, supported the inference of conspiracy. App. A at 61a-62a and 65a.

The Court of Appeals' Opinion. The opinion that prompts this Petition resulted from a *de novo* review of a grant of summary judgment. Petitioners do not contend that the Court of Appeals was to undertake anything but a *de novo* review. The court applied this Court's *Matsushita* and *Monsanto* decisions[3] and their principles concerning the inferences to be drawn from circumstantial evidence. App. A at 7a-15a. Applying *Matsushita*, the court simply reviewed the record before it in the context of the markets from which the claims arose and the substantive principles that applied to each situation it analyzed. App. A at 10a-15a. The opinion does not in any manner question, let alone repudiate or purport to alter, this Court's *Matsushita* decision. App. A at 7a.

The opinion examines the entirety of the parties' contentions on summary judgment. The court reversed the summary judgment against the states and remanded the case for trial. App. A at 4a and 66a.

SUMMARY OF THE ARGUMENT

The questions that petitioners present do not occasion the exercise of certiorari. The Petition asks only that the Court compare the Court of Appeals' de novo review of a grant of summary judgment on a substantial and fact-specific record to the District Court's markedly different reading of and decision on the same record. In its extensive but not exhaustive review of the evidentiary record, the Court of Appeals found substantial factual support for each of the inferences of conspiracy that respondents requested be drawn in their favor to defeat summary judgment on three related antitrust charges.

The Court of Appeals carefully explained and rigorously honored the standards and principles for determining a motion for summary judgment that this Court announced in its *Monsanto* and *Matsushita* decisions. Nothing in the opinion below departs

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[3] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574; *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752.

from the Court's directions concerning the respective roles of direct and circumstantial evidence in summary judgment proceedings, the inferences that may be permissibly drawn from circumstantial evidence, and the jury's role in weighing permissible competing inferences. Petitioners do not, because they cannot, demonstrate that the opinion contradicts this Court's summary judgment rules or conflicts with other circuits' applications of those rules. Certiorari is not appropriate for Question 1.

The Petition's arguments that the Court of Appeals has allowed antitrust liability to be imposed for "mere conscious parallelism" grossly misstate the court's holding. Petitioners neglect the specific factual context of the lower court's findings and corresponding substantive holdings. The same defect impairs the Petition's arguments that the Court of Appeals has created a strict liability standard for product shortages. Petitioners wholly ignore the substantial factual record of their acts upon which the Court of Appeals relied. Therefore, in the context of the summary judgment proceeding at issue, there is no evidentiary basis for considering, let alone endorsing, petitioners' arguments about their Questions 2 and 3.

ARGUMENT

I. PETITIONERS DEMONSTRATE NO VALID GROUNDS FOR ISSUANCE OF THE WRIT

The only reason given in the Petition for the issuance of the writ are that the Court of Appeals decision supposedly conflicts with this Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574, regarding standards for the grant of summary judgment, and with certain "bedrock" antitrust principles. Petition at pp.11, 13. Although petitioners assert that no other circuit has reached the same conclusions as the Court of Appeals, they necessarily stop short of any suggestion that there is a conflict among the circuits. Petition at p.11. It would not be surprising if the Ninth Circuit's decision has not yet been duplicated in other circuits; the extensive factual record in this case is unique, and *Matsushita* is a relatively recent decision that the circuits are still fleshing out. Because an actual conflict

has not developed, there is no reason for this Court to intervene in the process.

In reality, as this Opposition explains in detail, the Court of Appeals' decision in no way conflicts with the decisions of this Court. On the subject of summary judgment, the Court of Appeals expressly reiterates and follows the *Matsushita* standard. With regard to the basic principles of antitrust law, the Court of Appeals makes no new law; petitioners merely assert that the supposed misapplication of the *Matsushita* standard makes it unreasonably easy for plaintiffs to win an antitrust case.

Although petitioners cloak their petition as an attack on an erroneous interpretation of *Matsushita*, their argument really is that they do not agree with the way that the Court of Appeals applied the *Matsushita* standard to the extensive factual record in this action that included both direct and circumstantial evidence. They would prefer to have this Court re-evaluate the entirety of this evidence and possibly come to a different conclusion.

Petitioners' arguments depend upon a serious misreading of the Court of Appeals' decision. Indeed, to a large extent, the Petition tries to direct this Court into adopting the District Court's reading of the facts, which is considerably at odds with that of the Court of Appeals. In effect, petitioners ask this Court to sift through the evidentiary record and decide which of the courts below did a better job of analyzing the facts. This is not an appropriate role for this Court on certiorari.

II. THE COURT OF APPEALS FOUND SUFFICIENT FACTS TO DENY SUMMARY JUDGMENT

In the Petition for Certiorari, petitioners rely principally upon quotations from the decision of the District Court to state the facts of the case, and then argue that the Court of Appeals decided the case wrongly on those facts. Since the Court of Appeals was required to review the summary judgment *de novo*, the District Court's factual findings are legally irrelevant. The issue presented on this Petition is whether the Court of Appeals correctly concluded that there are genuine issues of material fact and that petitioners are not entitled to judgment as a matter of law.

Petitioners' discussion of the background facts of this litigation predominantly, and erroneously, cites to the District Court's statement of facts, without stating that it is drawing the facts from the District Court rather than the Court of Appeals. Petition at pp.3-5. Thus, petitioners are arguing that the Court of Appeals' decision should be overturned on the basis of the factual findings in the District Court decision that the Court of Appeals reversed. Not surprisingly, the District Court's decision does not support the Court of Appeals' decision. The thrust of the Court of Appeals' decision is that the District Court ignored many of the facts, such as direct evidence of price-fixing communications, that defeat summary judgment.

The District Court's opinion makes at best a cursory survey of the weighty factual record in this case and concludes, almost without reference to the record, that the court cannot find evidence sufficient to defeat summary judgment. In contrast, the Court of Appeals made a more searching (although by no means complete) examination of the evidence to conclude that there are genuine issues of material fact to be decided at trial—although the court's effort is difficult if not impossible to discern from the Petition here. In their petition for rehearing before the Court of Appeals, petitioners did not question any of the Court of Appeals' determinations of the facts, and they should be bound by those determinations now. Nevertheless, petitioners are necessarily asking this Court to choose the District Court's interpretation of the facts over that of the Court of Appeals.

The basic facts upon which the Court of Appeals based its reversal of summary judgment are stated in its opinion. While the court's opinion necessarily summarizes the extensive evidentiary record with which respondents resisted summary judgment, it does explain the types of evidence that respondents presented.

The first subject addressed by the Court of Appeals was plaintiff's evidence of price-fixing. Through the late 1960s, petitioners had an established practice of having secret face-to-face meetings and telephone contacts with each other for the express purpose of verifying the prices each was charging. App. A at 33a-35a. Additionally, respondents presented direct evidence that petitioners coordinated their price moves through direct contacts

with unfranchised independent marketers. App. A at 45a-49a. After this Court's decision in *United States v. Container Corp.* (1969) 393 U.S. 333, which made such activities more hazardous, petitioners' direct contacts with each other diminished in frequency but did not stop altogether. App. A at 40a-45a. However, for the most part, petitioners consciously shifted to other means of communication to achieve the same purpose. In particular, they began to post the prices in public places so that they could view one another's prices, even though there was no business reason for such postings other than signaling one another. App. A at 31a-33a. Similarly, they publicized their price changes in the press, even though the only reason for doing so was to signal each other regarding price changes. App. A at 24a-30a. The result of all these activities was a curious "sawtooth" pattern of gasoline prices: repeatedly, prices would gradually decline over a period of several weeks, and then abruptly "restore" to the previous high price in a relatively short period of time. App. A at 16a-17a.

On the issue of a supply conspiracy, the evidence showed the following. In August of 1972, the cycling of gasoline prices stopped abruptly. App. A at 54a-55a. Before this date, several petitioners had noted that it was desirable to eliminate excess production but that this result would require the collusion of the others. App. A at 55a-56a. Throughout the period before August 1972, petitioners engaged in numerous direct contacts among themselves to share supposedly confidential supply data. App. A at 56a-58a. They then explicitly chose not to expand refinery capacity to meet rising demand. App. A at 58a-59a. On the foreign supply front, petitioners as members of foreign consortia met and explicitly discussed how they would limit the growth of crude oil supplies in the Middle East. App. A at 62a-63a.

The gist of petitioners' argument is that, through a supposedly erroneous reworking of the summary judgment standards laid down in *Matsushita Electric Industrial Co. v. Zenith Radio Corp., supra,* 475 U.S. 574, the Court of Appeals was able to reverse summary judgment on the basis of a minimal set of ambiguous facts. To the contrary, the Ninth Circuit carefully examined the factual record and found the clear implication that petitioners had

jointly fixed prices and restrained supply. Under the standards that this Court has enunciated for evaluating motions for summary judgment, the Court of Appeals was duty bound to allow a jury the opportunity to review these facts.

Few of these facts are discussed or even mentioned in the Petition for Certiorari. Instead, petitioners deceptively argue that the Court of Appeals defied summary judgment law by overturning summary judgment on the basis of minimal facts that are not highly suggestive of collusion. The Petition effectively ignores the explicitly factual basis for the Court of Appeals' reversal of summary judgment.

III

THE COURT OF APPEALS DID NOT ALTER THE *MATSUSHITA* STANDARD

Petitioners argue that the Court of Appeals altered the standards for the grant or denial of a summary judgment laid down in *Matsushita* and *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752. Thus, the Petition asserts that the Court of Appeals "relieved respondents of any obligation to present" evidence that tends to exclude the possibility that petitioners acted independently. Petition at p.15. This contention simply misstates the Court of Appeals' holding. In reality, the Court of Appeals expressly acknowledged the "tends to exclude" standard. App. A at 8a.[4] It then applied the standard and found that much,

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[4] Not content merely to misstate the Court of Appeals' ruling, petitioners also blatantly mischaracterize an article written by respondents' counsel. Petitioners quote a published article by two of the State of Arizona's counsel to the effect that the Court of Appeals wrote the "tends to exclude" standard out of the law in this case. Petition at p.12. Petitioners reach this conclusion through the clever use of ellipses to invert the meaning of the quoted passage. The full text of the cited portion of the article, with the omitted language emphasized, is as follows:

> "Decisions applying *Matsushita* and *Monsanto* in cases involving wholly ambiguous evidence have required plaintiffs to present evidence that 'tends to exclude' the possibility of innocent conduct by

(Footnote continued on next page)

although not all, of the evidence presented by respondents actually did "tend to exclude the possibility" of independent action.

After acknowledging the "tends to exclude" standard of *Matsushita* and *Monsanto*, and applying it, the Court of Appeals then considered the kinds of evidence plaintiffs are permitted to use in resisting antitrust summary judgment. Far from easing the burden of respondents in resisting summary judgment, as petitioners so strenuously argue, the Court of Appeals observed limits on the kinds of circumstantial evidence plaintiffs may use to argue that their evidence "tends to exclude the possibility of independent action." Indeed, the Court of Appeals precisely followed *Matsushita* and *Monsanto* in applying certain restrictions on the proof upon which the party resisting the motion may rely.

The first step of the *Matsushita* summary judgment analysis is for the moving party to make a showing of the absence of a genuine issue of material fact. *Matsushita*, 475 U.S. at 586, n.10. The Court of Appeals proceeded on the assumption that petitioners had met this burden. See, e.g., App. A at 18a.

The next step is that the party resisting the motion must come forward with specific facts, direct or circumstantial, to demonstrate that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 586-587. The inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion, but conduct as consistent with competition as with conspiracy does not, standing alone, support an inference of conspiracy. *Id.* at 587-

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the alleged conspirator. *Defendants seeking summary judgment frequently contend that this 'tends to exclude' standard allows a court in any case to grant summary judgment unless plaintiff can rebut the motion with a preponderance of the evidence.*

"Now, in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir.1990), *rehearing denied* (Jan. 8, 1991), the Ninth Circuit has rejected the notion that *Matsushita* and *Monsanto* created such an evidentiary burden for plaintiffs."

M. Spiegel & W. Liao, *Avoiding Summary Judgment After* Matsushita *and* Monsanto, 5 Antitrust 12 (Spring 1991).

588. Instead, a plaintiff resisting summary judgment in an antitrust case must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. *Id.* at 588. In other words, a plaintiff "must show that the inference of conspiracy is *reasonable* in light of the competing inferences of independent action or collusive action that could not have harmed" plaintiff. *Ibid.* (emphasis added).

The Court of Appeals scrupulously observed this standard. The court carefully examined plaintiffs' evidence to determine whether it tended to exclude the possibility of independent action. For example, the court considered plaintiffs' pricing pattern evidence and found that it was insufficient, standing alone, to establish an inference of price-fixing. App. A at 22a. Similarly, the court held that oil company logs indicating advance price knowledge were insufficient, standing alone, to support an inference of collusion under *Matsushita*. App. A at 44a. Nevertheless, the Court of Appeals reversed summary judgment because it also found additional evidence that, when considered with the evidence of parallel pricing and advance price knowledge, did tend to exclude the possibility that defendants had acted independently. That evidence included a long history of direct price communications aimed at raising or stabilizing prices (App. A at 33a-54a), price postings undertaken specifically to communicate prices to competitors in lieu of direct contacts, without any legitimate business purpose (App. A at 31a-33a), press releases issued for the same purpose (App. A at 24a-30a), direct evidence of communications with independent marketers to fix prices (App. A at 45a-54a), exchange of supply data in the face of an acknowledged interest in limiting supply (App. A at 55a-62a), and joint efforts to limit growth of Middle East production (App. A at 62a-65a). Given this additional evidence, the Court of Appeals properly concluded that plaintiffs had presented more than just neutral facts consistent with conspiracy. They had not, for example, rested on evidence showing only simple parallel pricing and an opportunity to conspire. They had presented direct and circumstantial evidence showing that the inference of conspiracy was reasonable in light of the competing inference of independent action. Plaintiffs had therefore met their fundamen-

tal burden in opposing summary judgment. App. A at 39a, 45a, 52a, 54a n.22, 61a and 65a.

However, having identified evidence that tends to exclude the possibility of independent action, the Court of Appeals did not conclude its analysis. Instead, the court held, citing *Monsanto* and *Matsushita*, that even a showing of evidence that tends to exclude the possibility of independent action may not be enough to defeat summary judgment. App. A at 11a-12a. According to the Court of Appeals, if the plaintiff introduces evidence that "tends to exclude" the possibility of independent action, summary judgment may nevertheless be appropriate if the inference that the plaintiff requests would deter significant procompetitive conduct. App. A at 11a.

The Court of Appeals summarized this standard as follows:

> "In summary, we conclude that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior. Once the defendant has made such a showing, the plaintiff must come forward with *other* evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully."

App. A at 13a-14a (emphasis added).

In other words, the Court of Appeals held that it may not be enough for antitrust plaintiffs to present sufficiently unambiguous evidence of collusion to defeat summary judgment. Because of the possible risks posed to the competitive marketplace, some types of evidence, standing alone, cannot be used to defeat summary judgment, even though they may tend to exclude the possibility of independent action.

The Court of Appeals found this restriction implicit in *Matsushita* and *Monsanto*. App. A at 11a-12a. Whether the Ninth Circuit was correct in this interpretation is not before this Court at this time, since respondents were able to meet the burden that the Court of Appeals had placed on them. Under any permissible

interpretation of *Matsushita*, respondents presented an evidentiary record more than adequate to defeat summary judgment.

No matter how much they try to finesse the issue, petitioners' real complaint about the Court of Appeals decision is that it does not give the trial court the power to weigh the inferences and choose the ones it thinks most likely. Thus, petitioners take umbrage with the following passages from the Court of Appeals decision:

> We do not take [the *Matsushita* test] as suggesting that a district court may grant summary judgment whenever the court concludes that inferences of conspiracy and innocent conduct are equally plausible.
>
> . . . . . .
>
> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct.

Petition at p.15, quoting App. A at pp.8a-9a, 10a.

The Court of Appeals' statements are clearly correct. They simply repeat the time-honored rule that the trial court is not empowered to weigh inferences in the place of the jury. To secure summary judgment, an antitrust defendant must do more than convince a court that there is evidence that is consistent with its point of view. It must convince the court that there is insufficient evidence that would make the inference of conspiracy reasonable in light of the competing inferences of independent action. *Matsushita*, 475 U.S. at 588.

Petitioners do not stop here, however. They go on to criticize the Court of Appeals for supposedly adopting the converse of the quoted statements, although it clearly did not do so. The Court of Appeals did not say that summary judgment must be denied whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct, as petitioners insist. Petition at p.16. Rather, the Court of Appeals noted that, by its very nature, circumstantial evidence is usually consistent

with competing sets of inferences (App. A at 10a), and it is not the role of the court to choose among them based on its own view of how the facts should be determined. App. A at 9a-10a. Rather, to defeat summary judgment, the antitrust plaintiff must present sufficiently unambiguous evidence, direct or circumstantial, that tends to exclude the possibility of independent action. App. A at 8a and 14a. Additionally, in meeting this burden plaintiff may not ask the court to draw an inference from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct. App. A at 11a.

The Ninth Circuit's interpretation of *Monsanto* and *Matsushita* as not allowing the court to weigh inferences in the place of the jury is surely correct. Once plaintiff has met its burden of introducing evidence that tends to exclude the possibility of independent action, it is to be expected that defendant might present a case that plausibly leads to the inference that it is innocent. If the trial court has the power to decide which inference is more plausible, there is no right of jury trial left. The summary judgment motion is the trial.

This conclusion does not contradict footnote 21 of *Matsushita*. Footnote 21 holds that no inference can be drawn from conduct that is merely consistent with conspiracy. 475 U.S. at 597 n.21. It does not suggest that, once an inference is permissibly drawn, the court can weigh it against competing inferences.

Monsanto itself illustrates this point. In *Monsanto*, after finding that plaintiff had introduced evidence that met the "tends to exclude" standard, this Court did not then attempt to weigh competing inferences:

> The choice between two reasonable interpretations of the evidence was properly left for the jury.

465 U.S. at 767 n.12.

> Monsanto's contrary evidence has force, but we agree with the courts below that it was insufficient to take the issue from the jury. . . . [W]e cannot say that the courts below erred in finding that Spray-Rite produced substantial evidence of the concerted action required by § 1 of the Sherman Act [15

> U.S.C. section 1], and that—despite the sharp conflict in evidence—the case properly was submitted to the jury.

Id. at 768 n.14.

In summary, petitioners' argument that the Court of Appeals has somehow undermined this Court's decisions in *Monsanto* and *Matsushita* plainly mischaracterizes the decision in the court below. Their real complaint is that they disagree with the Court of Appeals' assessment of the substantial evidentiary record in this action, a criticism that scarcely justifies a grant of certiorari.

IV. THE COURT OF APPEALS DID NOT ALLOW LIABILITY TO BE IMPOSED FOR "MERE CONSCIOUS PARALLELISM"

Petitioners protest vociferously that the Court of Appeals has allowed liability to be imposed for "mere conscious parallelism." Once again they have mischaracterized both the Court of Appeals' holding and the record in this case. Petition at p. 19.

The Court of Appeals quite clearly stated the rule of law that petitioners claim they want this court to establish:

> We recognize that such interdependent pricing may often produce economic consequences that are comparable to those of a classic cartel. Nonetheless, proof of such pricing, *standing alone*, is generally considered insufficient to establish a violation of the Sherman Act. . . . Additional proof beyond mere parallel pricing usually is required.

App. A at 22a (emphasis in original).[5]

Thus, petitioners' real complaint is not that the Court of Appeals made an incorrect rule of law, but rather that it misapplied the standard. Petitioners ask this Court to review again the factual record in this case to determine whether the Court of Appeals was correct in concluding that respondents produced

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[5] In an accompanying footnote, the Court of Appeal also observed: "In some cases, when a market is highly unconcentrated, parallel pricing alone may be all the proof that is required." App. A at 22a, n.9. This statement is pure dictum, and so could not be effectively reviewed by this Court on a grant of certiorari in this case.

sufficient additional evidence that, when considered with the pricing evidence, "tends to exclude" the possibility of independent action.

Petitioners assert that a unilateral decision to publish or announce prices is lawful. Petition at pp.23-24. While this naked assertion is unexceptionable, it has nothing to do with the facts of this case. Here, the Court of Appeals found a number of factors from which it would be reasonable for a jury to conclude that petitioners were not merely unilaterally announcing prices, but were colluding on prices—the precise issue the court is required to determine in considering summary judgment under *Matsushita*.

From the extensive factual record of this case, the Court of Appeals highlighted a number of facts that indicated that petitioners' pervasive price dissemination policies were something other than unilateral decisions to announce prices. The executives of the oil companies testified that their purpose in publishing tankwagon prices was to inform competitors quickly of a price move in the express hope that they would follow the move. App. A at 24a. Even more to the point, there was no purpose for the publication of these prices other than to facilitate interdependent or collusive pricing. *Id.* at 24a-25a, 29a. Similarly, petitioners publicly posted tankwagon prices in exceptional detail specifically for the purpose of alerting one another to price changes. *Id.* at 31a-33a. These practices were set against the background of a long history of secret face-to-face and telephone discussions of prices among petitioners undertaken for the express purpose for stabilizing prices. *Id.*at 33a-35a. Additionally, petitioners coordinated price moves through direct contacts with independent marketers. *Id.* at 45a-49a. The direct price contacts among petitioners continued at a reduced level after this Court's decision in *United States v. Container Corp.* (1969) 393 U.S. 333 (App. A at 40a-45a), but for the most part petitioners substituted the other price dissemination practices in a cynical attempt to tiptoe around *Container*. *Id.* at 35a-37a.

Thus, petitioners' price dissemination practices were more than simple unilateral price announcements. They were an extension of a comprehensive system of notifying one another of price changes

for the express purpose of stabilizing prices. Consequently, this evidence "tends to exclude" the possibility of independent action; it makes the inference of conspiracy reasonable in light of the competing inference of innocent conduct.

In short, the Court of Appeals did not endorse the imposition of liability for mere conscious parallelism. What petitioners really ask this Court to do is to sift through the evidence again and come to a different conclusion about its significance.

V. THE COURT OF APPEALS DID NOT CREATE A STRICT LIABILITY STANDARD FOR PRODUCT SHORTAGES

Petitioners again mischaracterize both the decision of the Court of Appeals and the record in this case, when they suggest that the court introduced a strict liability standard for product shortages. Petition at p. 25. To the contrary, the Court of Appeals considered the substantial factual record in detail, and determined that there was indeed evidence that, in the context of the specific industry being considered, did "tend to exclude" the possibility of independent action. In reality, petitioners want this Court to second-guess the Court of Appeals' assessment of the evidence.

Specifically, the Court of Appeals found the following. In August 1972, price cycles abruptly ended, with prices remaining at their former high level and then steadily climbing. App. A at 54a. Before that time, a number of petitioners noted internally not only that supply restrictions were needed to stabilize prices, but that such restrictions required joint action by petitioners. *Id.* at 55a-56a. Throughout the period up to the cessation of the price cycling, petitioners exchanged detailed internal supply information, often through direct personal contacts. *Id.* at 56a-58a. In particular, in the month in which price cycling ceased, petitioner Exxon surveyed a large number of oil companies to determine their crude oil supply situation. *Id.* at 57a. Finally, in the context of foreign production consortia, a number of petitioners quite blatantly discussed proposals to reduce the production of foreign crude oil. *Id.* at 62a-64a.

However, contrary to petitioners' characterization, the Court of Appeals did not suggest that these facts, standing alone, necessa-

rily led to the conclusion that petitioners had conspired to reduce supply. Rather, it held that in the context of this particular market, in light of its specific characteristics making independent supply reduction decisions unlikely, these facts could reasonably lead a jury to conclude that petitioners agreed to exchange supply and demand information to facilitate a mutual slowing of increases in supply capacity. *Id.* at 60a-61a.

Petitioners are therefore not asking this Court to resolve any pressing issues of law. Instead, they are merely asking this Court to review the Court of Appeals' assessment of the evidence and come to a different conclusion. This is not the proper function of certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Chamber of Commerce of the United States of America ("the Chamber") and the National Association of Manufacturers of the United States of America ("NAM") hereby move for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari. The Petitioners have consented to the filing of the brief. The Respondents have denied consent.*

1. The Chamber of Commerce of the United States of America (the "Chamber") is the largest federation of business companies and associations in the world. The Chamber represents nearly 180,000 businesses and organizations, with substantial membership in each of the 50 states, and serves as the principal voice of the Amer-

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* *See* attached letters.

ican business community. Eighty-nine percent of the Chamber's members (approximately 160,000) are small businesses with 49 or fewer employees. The vast majority of its members conduct interstate commerce and are subject to the federal antitrust laws. The Chamber has a strong interest in cases such as this, which threaten the way business is conducted across the nation. The holding of the Ninth Circuit, if allowed to stand, will have a substantial and potentially anticompetitive impact on the manner in which the Chamber's members make pricing decisions.

2. The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,500 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. The members of NAM and these councils are vitally interested in restrictions on their ability to announce the prices of their products.

3. Pursuant to Rule 37.1 of the Rules of the Court, the Chamber and NAM move to file their brief *amicus curiae* to bring "relevant matter[s] to the attention of the Court that [have] not already been brought to its attention by the parties" that strongly support exercise of the Court's jurisdiction. Our brief highlights the following issues, in addition to the matters addressed in detail in the Petition.

4. First, our brief argues that what the Ninth Circuit labels in its decision "interdependence" is the very essence of the competitive process—the essential interaction through which the law of supply and demand forces prices to adjust to relative scarcity and oversupply. Both as a matter of policy and to preserve the ordinary and proper business practices of its members, the *amici* oppose any

effort to confuse "interdependence" with collusion. This essential difference between lawful interdependence and unlawful collusion must be preserved (defined by this Court as a "conscious commitment to a common scheme designed to achieve an unlawful objective").

5. Second, our brief argues that the use of circumstantial evidence to establish a "conscious commitment to a common scheme" must be viewed with great skepticism because the powerful pressure on business people to meet competition often makes observed pricing patterns in intensely competitive markets as tightly bunched as pricing patterns in theoretically collusive markets. The Chamber's and NAM's small business members, whose pricing must almost always be "at market," are peculiarly vulnerable to such dualistic interpretations of pricing behavior. For this reason, the Chamber and NAM firmly support the teaching of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986) that observed conduct which can be equally explained by competitive interaction or collusion is simply not probative on the issue of "conscious commitment."

6. Finally, our brief demonstrates how the Ninth Circuit's decision, if not reversed, will create grave risks for businessmen who collect, disseminate and/or permit dissemination of pricing information to facilitate unilateral pricing decisions. Unless a trial court acting under that decision determines that price dissemination is significantly procompetitive (whatever that vague new standard means) in a particular market, observed price dissemination itself would block summary judgment on price-fixing charges and permit a jury to infer both a "conscious commitment to a common scheme" of price exchange and a consequent price-fixing agreement. The consequences will be both widespread, unfair and punitive labelling of avid competitors as price fixers and a severe chilling effect on the accumulation of competitive intelligence. It is essen-

tial to preserve the distinction between unlawful collusion and the inevitable, welfare-maximizing, interdependence of unilateral decisionmaking in competitive markets.

In order to bring these matters to the attention of the Court, the Chamber and NAM respectfully move for leave to file the attached brief in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of businesses and associations in the world. The Chamber represents nearly 180,000 businesses and organizations, with substantial membership in each of the 50 states, and serves as the principal voice of the American business community. Eighty-nine percent of the Chamber's members (approximately 160,000) are small businesses with 49 or fewer employees.

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,500 companies and

subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The Chamber and NAM are greatly concerned that the Ninth Circuit has created a summary judgment standard in Sherman Act Section 1 cases [1] founded on circumstantial evidence that will greatly restrict, if not completely prohibit, heretofore legitimate business conduct.[2] The decision will have a negative impact on Chamber and NAM members of all sizes, not just the large oil companies directly involved. The decision threatens the availability of summary judgment in situations where it should clearly be available and deters procompetitive business practices which have previously been recognized as essential to the orderly functioning of free markets. In those instances when the alleged conspiratorial practice is a matter of economic necessity, Chamber and NAM members will be subject to treble damages for conduct which the marketplace demands of them.

Price competition between businesses, the virtual hallmark of a free economy, will be seriously impaired. Under the Ninth Circuit's ruling, a plaintiff will need only to produce evidence of interdependent pricing by two or more businesses, coupled with public pricing announcements, to bring a credible lawsuit, even though this Court has always held that interdependent pricing alone is not enough to base a finding of a Section 1 violation. Regardless of the legitimacy of the claim, businesses of all sizes will be faced with increased litigation exposure, and the courts will be burdened by many more cases. The Ninth Circuit seems determined to rewrite the law on summary judgment in antitrust suits.

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[1] 15 U.S.C. § 1.

[2] *State of Arizona v. Standard Oil Co. of California*, 906 F.2d 432 (9th Cir. 1990).

The Ninth Circuit declares the basis of its ruling to be *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), yet the decision is a radical departure from those cases. In marked contrast, no other court of appeals has adopted such a restrictive view of when summary judgment is properly granted.

The plaintiffs' primary allegation in this case is that the defendants engaged in a conspiracy to fix prices, and their main evidence of this is interdependent pricing. This brief illustrates the imbalances the new standard will create in the arena of price competition between small businesses, using the same type of evidence in the illustration that the plaintiffs have asserted in the case.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION IS A RADICAL DEPARTURE FROM *MONSANTO* AND *MATSUSHITA* SINCE THE EVIDENCE WAS AT LEAST AS PROBATIVE OF UNILATERAL PRICING DECISIONS AS IT WAS OF COLLUSIVE BEHAVIOR.

The Chamber and NAM are firm believers in the unconstrained operation of free markets and thus support the antitrust laws and oppose price collusion. At the same time, the Chamber and NAM recognize that in a free market economy their members must take account of each other's competitive conduct, including competitive pricing, in deciding how rationally to conduct their business affairs. Indeed, as this Court has often held, the boundaries of a competitive market are defined by cross-elasticities of supply and demand—*i.e.*, the degree to which buyers and sellers respond to each other's actions. Thus, what the Ninth Circuit labels in its decision "interdependence" is the very essence of the competitive process —the essential interaction through which the law of supply and demand forces prices to adjust to relative scarcity and oversupply. Both as a matter of policy and to pre-

serve the ordinary and proper business practices of its members, the Chamber and NAM oppose any effort to confuse "interdependence" with collusion. This essential difference between lawful interdependence and unlawful collusion (defined by this Court as a "conscious commitment to a common scheme designed to achieve an unlawful objective"[3]) must be preserved. The Ninth Circuit undermines this definition by allowing mere interdependence to be collusion.

The use of circumstantial evidence consisting of legally ambiguous or perfectly lawful conduct to establish a "conscious commitment to a common scheme" must be viewed with great skepticism because without such practices most markets don't work. The Chamber's and NAM's small business members, whose pricing must almost always be "at market," are peculiarly vulnerable to such dualistic interpretations of pricing behavior. For this reason, the *amici* firmly support the teaching of *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Industrial Co.* v. *Zenith Radio*, 475 U.S. 574 (1986) that observed conduct which can be equally explained by competitive interaction or collusion is simply not probative on the issue of "conscious commitment."

The Ninth Circuit has departed radically from *Monsanto* and *Matsushita*, and a whole line of cases allowing parallel pricing, by treating non-probative conduct, such as parallel pricing and unilateral publication of pricing actions, as permitting an inference of collusion.[4] Paying lip service to *Monsanto* and *Matsushita*, the Ninth Circuit would foreclose that inference from blocking summary

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[3] *Monsanto*, 465 U.S. at 764.

[4] "This Ninth Circuit reading of *Matsushita* conflicts with other circuits' opinions applying *Matsushita*, as well as with earlier Ninth Circuit opinions requiring only that the defendant prove plausible, independent business justifications for its conduct." DeSanti and Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 Antitrust L.J. 609, 628.

judgment only where the Court believes the observed behavior at issue to be significantly procompetitive, whatever that vague new standard means.[5] In all other circumstances, the Ninth Circuit would permit a plaintiff to put collusion allegations before a jury even where the observed evidence relied upon could be equally explained by competitive interaction or collusion.

On the specific facts presented below, the Ninth Circuit held that parallel pricing itself could defeat summary judgment if the Court determined the market to be less than necessarily interdependent. Finding interdependence to be appropriate in the wholesale gasoline market at issue, however, the Ninth Circuit went on to rest its denial of summary judgment on observed "price dissemination" practices which: (1) could be explained equally by collusion or by the parallel, but unilateral, interest of the petitioners involved in facilitating the acquisition of market intelligence; (2) were determined by the Court, *de novo*, to be not significantly procompetitive; and (3) were further determined by the Court to support the highly questionable double inference: (a) that collusive price exchanges were in place, (b) for the purpose of supporting a "conscious commitment to a common scheme" to fix prices.

Petitioners have fully explained the Ninth Circuit's deviation from: the teaching of *Monsanto* and *Matsushita*; the sounder interpretation of that guidance by other circuits; and the relevant principles of antitrust law and evidence. The Chamber and NAM concur in that analysis and need not repeat it. However, the Chamber and NAM would like to draw the Court's attention to their particular

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[5] Apparently, in the context of the present case, the unilateral publication of price information and conscious parallel pricing within an industry are presumptively lawful as long as prices are falling, but give rise to an inference of unlawful collusion whenever industry prices rise. A "free market" necessarily assumes prices can move up or down, in response to supply and demand.

concern with the Ninth Circuit's misplaced focus on price dissemination and with the potential for abuse of the Ninth Circuit's standard to unfairly pressure small businesses and to stifle meaningful price competition. In addition to the error in the Ninth Circuit's analysis of this Court's teaching and its consequent weakening of the salutary principles of *Monsanto* and *Matsushita*, these factors clearly support a grant of *certiorari* to avoid widespread adverse impacts on Chamber and NAM members.

II. PRICE DISSEMINATION IS AS ESSENTIAL TO UNILATERAL PRICING DECISIONS BY SELLERS AS IT IS TO UNILATERAL CONSUMER CHOICE.

The Ninth Circuit, perhaps confused by this Court's decision in *United States v. Container Corp. of America*, 393 U.S. 333 (1969), which arose in the special circumstances of an individually quoted market where secrecy was a competitive weapon, viewed "price dissemination" with great suspicion. As practical business people, however, Chamber and NAM members recognize that market information is as essential to unilateral pricing decisions by sellers as it is to unilateral consumer choice. A business person who is slow to acquire competitive pricing information will inadequately protect his sales base and or his revenue base and may find it hard to survive in a competitive market. Thus, even the most fiercely competitive business person may find it in his unilateral self interest not to disturb custom and usage—for example, price postings or trade press reporting—which rapidly disseminate pricing intelligence. Moreover, business people are highly unlikely to take affirmative action to foreclose dissemination by their customers or intermediaries like brokers who routinely acquire price lists. Indeed, as a practical matter, business people will often determine unilaterally that the benefits of information acquisition in an "open market" outweigh the costs of sacrificing the temporary secrecy of their own pricing initiatives. Par-

ticularly where, as in this case, retail sales make wholesale price changes known to the trade in a relatively short time, the competitive benefits of temporary secrecy appear very limited relative to the advantages of an open market in reaching unilateral pricing decisions.

The Ninth Circuit's decision, if not reversed, will create grave risks for businessmen and women who collect, disseminate and/or permit dissemination of pricing information to facilitate unilateral pricing decisions. Unless a trial court acting under that decision determines that price dissemination is significantly procompetitive in a particular market, observed price dissemination itself would block summary judgment on price-fixing charges and permit a jury to infer both a "conscious commitment to a common scheme" of price exchange and a consequent price-fixing agreement. The consequences will be both widespread, unfair and punitive labelling of avid competitors as price fixers and a severe chilling effect on the accumulation of competitive intelligence resulting in markets which sluggishly and inefficiently respond to competitive initiatives. Consumers, as well as Chamber and NAM members, can only be harmed in the process.

The pernicious, and essentially irrational, character of the Ninth Circuit's analysis can be illustrated by considering two competing lumber suppliers in each of two small towns who post lumber prices on their doors. In the first town, both suppliers deal exclusively with contractors with whom they have historic ties, a situation reinforced by their location at opposite ends of town. In the second town, both suppliers have exclusive and non-exclusive customers and occupy relatively contiguous locations. In both towns, however, contractors compete with each other for all jobs with lumber cost a key factor so that the lumber suppliers are sensitive to each other's pricing.

Using the Ninth Circuit's analysis, posting in the first town could be determined not to be a significantly pro-

competitive activity since contractors do not comparison shop. Thus, posting activity—particularly combined with the parallel pricing necessary to preserve contractor relations with lumber suppliers—would establish a jury case of price fixing. Posting in the second town, however, would likely be determined to be significantly procompetitive because it facilitates shopping by non-exclusive contractors. Thus, the same posting and parallel pricing activity in the second town would not be deemed sufficient to establish a jury case of price fixing despite the fact that the potential impact of market intelligence on the actions of the lumber suppliers would be the same in both towns. Even assuming that sophisticated lawyers, economists and judges could understand and accept these differing results, Chamber and NAM members and consumers will inevitably find them contrary to common sense and reasonable business conduct. The result will be an inevitable deterioration of respect for the antitrust laws coupled with a systematic effort—by those fortunate enough to avoid the inevitable trap for the unwary or uncounselled—to operate on a market intelligence-blind basis with a clear reduction of the efficiency that antitrust is intended to promote.

Chamber and NAM members are particularly sensitive to aberrational interpretations of the antitrust laws relating to price fixing because they can, as illustrated above, distort the central nervous system of competitive markets and because they also threaten grave and unfair consequences for innocent sellers. The threat of massive treble damages based on speculative analysis under the *Bigelow* rule,[6] the imposition of attorneys fees in addition to damages and the moral opprobrium of a price fixer label put a powerful litigating tool into the hands of plaintiff's counsel. Faced with the cost and uncertainty of a jury trial on circumstantial evidence, business people —particularly small business people—may be bullied into

[6] *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946).

totally unfair settlements simply because they sought competitive intelligence. The teaching of *Monsanto* and *Matsushita* avoided this *in terrorem* effect by giving the courts power to stop such inferential exercises at the threshold. The Ninth Circuit's decision, unless reversed, will undo that comfort, send chills throughout the small business community, and erect a "regulatory" barrier to the flow of price information which is the lifeblood of a competitive and efficient market.

CONCLUSION

For the reasons stated above, the Court should grant the Petition for Certiorari, and reverse and remand the decision of the Ninth Circuit.

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No. 90-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE AMERICAN ADVERTISING FEDERATION, INC., IN SUPPORT OF PETITIONERS

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IN THE

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MOTION OF THE AMERICAN ADVERTISING FEDERATION, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Advertising Federation, Inc. ("AAF") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of the petitioners herein.*

The purpose of this brief is to call to the Court's attention an important issue not briefed by the petitioners: the significant chilling impact the opinion below will have on lawful commercial speech. The court below acknowledged that parallel pricing is lawful. Yet it held that where parallel pricing is accompanied by the public dissemination of price information—a form of commercial speech that is commonly carried out through advertising—the firm engaged in such public dissemination will be exposed to an antitrust jury trial over whether its paral-

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* Counsel for the AAF has contacted counsel for all parties to seek their consent to the filing of this *amicus curiae* brief. Counsel for the State of Arizona withheld such consent.

lel pricing decisions were the product of a conspiracy with its competitors. This decision will inhibit firms from disseminating price information to the marketplace through advertising. The court below ignored both the procompetitive benefits that flow from such advertising and the constitutional protection accorded to commercial speech. And because practical realities make it impossible to conduct a national advertising campaign in a way that is insulated from antitrust scrutiny by federal courts within the Ninth Circuit, the inhibitions imposed by this decision on price advertising will be felt nationwide.

The AAF has an interest in the uninhibited flow of the affected commercial speech. The AAF is a national trade association encompassing all elements of the advertising industry, including as members companies that produce and advertise consumer products; advertising agencies; magazine and newspaper publishers; radio and television broadcasters; radio and television networks; outdoor advertising organizations; and other media. Its membership also includes twenty-one national trade associations; over two hundred local advertising clubs, with 52,000 members; and over two hundred college chapters, with 6,000 student members. The AAF and its members therefore have a direct and long-standing interest in preserving the free flow of advertising and commercial speech.

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BRIEF AMICUS CURIAE OF THE AMERICAN ADVERTISING FEDERATION, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears in the accompanying motion.

SUMMARY OF ARGUMENT

In *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court confirmed that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. Parallel pricing is both lawful and commonplace. As this Court has long recognized, such conduct alone cannot give rise to any inference of a price-fixing conspiracy. The public dissemination of price information is also lawful

and commonplace. Yet the court of appeals below held that if the public announcement of wholesale gasoline prices by oil companies is accompanied by parallel pricing, the simultaneous presence of these two lawful activities is sufficient to permit a jury to infer the existence of an unlawful price-fixing conspiracy. This decision is likely to have a serious adverse impact on advertising and commercial speech, which may be felt far beyond the factual context in which this case arose.

Advertisements of prices are analytically indistinguishable from the public price announcements that the court of appeals in this case held could support an inference of conspiracy under *Matsushita*. The decision of the court below threatens to have a profound chilling effect on lawful, beneficial advertising by threatening firms that would run such advertising with the prospect of treble damage litigation under the antitrust laws. Most advertisers will drop the price advertisements rather than gamble over whether a jury will conclude mistakenly that such businesses were participants in an antitrust conspiracy.

In addition, the decision completely ignores the constitutional protections that commercial speech enjoys. It is simply untenable to conclude, as the lower court does, that truthful commercial speech (such as a price announcement) serves no beneficial purpose. The ramifications of the decision below are of such seriousness that this Court should grant certiorari. The decision of the court of appeals is clearly wrong, and it should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS LIKELY TO HAVE A BROAD CHILLING EFFECT ON PRICE ADVERTISING

Under the antitrust laws, a jury is not free to speculate that ostensibly lawful conduct may actually have been undertaken pursuant to conspiracy. As this Court clearly stated in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), "antitrust law limits the range of permissible inferences from ambiguous evidence." *Id.* at 588. Nevertheless, the court of appeals in this case held that one lawful act—the dissemination of wholesale prices through press releases—may give rise to an inference of a price-fixing conspiracy when viewed in conjunction with another lawful act—parallel pricing.

Logically, if the antitrust laws permit an inference of conspiracy to be drawn from announcements of prices through press releases (as the court below held), then the same inferences also could be drawn from price announcements through paid advertising. No tenable legal distinction can be drawn between a situation in which prices are made public by disclosure to trade journal reporters and a situation in which prices are made public through paid advertising. Thus, unless the decision below is reversed by this Court, AAF members and others who place advertisements containing price information will run the risk that such advertisements may be considered evidence of unlawful price-fixing conspiracies. Advertisers have traditionally been wary of any type of advertising that may create legal liabilities, and as a general matter, advertisers seek to steer clear of such advertisements. The decision of the court of appeals in this case therefore is likely to have a significant deterrent effect on the placement of advertisements containing price information.

Notably, the decision below stands in sharp contrast to a number of decisions by other courts, which have

refused to permit an inference of a price-fixing conspiracy to be drawn from public dissemination of price information. *See, e.g., Universal Lite Distributors, Inc.* v. *Northwest Industries, Inc.*, 452 F. Supp. 1206, 1217 (D. Md. 1978), *aff'd in relevant part*, 602 F.2d 1173 (4th Cir. 1979) ("this Court cannot conclude that public or advance announcements of price changes . . . amounted to any violation of the antitrust laws"); *United States* v. *General Motors Corp.*, 1974-2 Trade Cas. (CCH) ¶ 75,253 at 97,671 (E.D. Mich. 1974) ("[t]he public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react").

The chilling effects of the court of appeals' decision will not, however, be limited to the Ninth Circuit. Rather, the impact of this decision upon advertisers is likely to be felt nationwide. Advertising campaigns are frequently national in scope, and such national campaigns must adhere to the most restrictive legal regulation that is applicable in any local market. It simply would not be feasible for a seller who runs price advertisements on a national scale to delete the price information from those advertisements appearing within the geographic boundaries of the Ninth Circuit. If price advertisements that appear within the boundaries of the Ninth Circuit give rise to unacceptable legal risks, the likely response of advertisers will be to omit the advertisements everywhere.

Moreover, even if it were feasible for an advertiser to limit the geographic scope of its price-related advertising —and to refrain entirely from placing price advertisements in the Ninth Circuit—the risks imposed by the court of appeals' decision would not be avoided. Even if price advertisements are not run within the Ninth Circuit, competitors within the Ninth Circuit can still read, view or hear these advertisements. If a price-fixing suit is then brought within the Ninth Circuit, it will be governed by the erroneous construction of *Matsushita* set forth by the court of appeals in this case.

Deterring the publication of advertisements containing price information will not advance the goals of the antitrust laws. As a general matter, the more participants in the market know about price levels, the more competitive the market will be. Indeed, the Federal Trade Commission has stated that "[a]dvertising . . . performs an indispensable function in the allocation of resources in a free enterprise system." *F.T.C.* v. *American Medical Ass'n*, 94 F.T.C. 701, 1005 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

The court below evidently recognized the value of price information at the retail level where individual consumers make their buying decisions. It therefore added to its opinion a cryptic footnote distinguishing between the dissemination of *retail* price information on the one hand and the dissemination of *wholesale* price information on the other hand. *See* 906 F.2d at 448 n.14. According to the court of appeals, an inference of conspiracy could properly be drawn from the public announcements of *wholesale* prices in a case like this one, because such an inference would not "significantly deter important legitimate conduct." *Id.* at 448. Yet, according to the court, an inference of conspiracy might not be permissible where *retail* prices are publicly announced, because retail price announcements may serve a legitimate function—*i.e.*, enabling "retail consumers to get the information they need to make efficient market decisions." *Id.* at 448 n.14. This attempted distinction does not, however, eliminate the pernicious consequences of the court of appeals' opinion.

First, the court of appeals' opinion will have anticompetitive consequences even if its chilling effect is confined to advertisements involving purely wholesale prices. Contrary to the court of appeals' assumption, public dissemination of wholesale price information serves legitimate competitive goals. In many industries, wholesalers compete actively to get retailers to carry their products,

and wholesale prices are an important element of the competition. Retailers often buy goods from a variety of wholesalers and need price information from the competing wholesalers to make market decisions. Any deterrent to wholesale price advertising would have significant anticompetitive effects on such industries.

Furthermore, the court of appeals was simply wrong in concluding that wholesale pricing information serves no legitimate function in markets where franchising is common, such as the gasoline industry. Such markets are often characterized by significant competition among suppliers for the continued allegiance of their franchised dealers. Franchise arrangements rarely last forever; dealers initiate and terminate franchise arrangements and dealers seeking new franchise relationships enter the market. Wholesale price information may be highly relevant to franchised dealers deciding whether to seek a new franchise relationship. Thus, the sweeping deterrent to wholesale price advertising imposed by the opinion below can only have a negative impact upon competition in such markets.

Second, the opinion below is likely to deter a common form of price advertising that does not fall neatly within either the wholesale or the retail category—*i.e.*, advertising by manufacturers of "suggested" retail prices, which may or may not reflect actual retail prices. Enterprising antitrust plaintiffs will argue that wholesale prices can be calculated with reasonable accuracy from suggested retail prices, and that advertisements of suggested retail prices are therefore the functional equivalent of wholesale price announcements. Because such price advertising may be used as evidence of a conspiracy under the decision below, cautious manufacturers will refrain from such advertising. Yet the procompetitive benefits of such advertisements are obvious. They tell consumers the price the manufacturer believes the dealer can sell at and still realize a fair profit. Armed with that information, the consumer can bypass the price-

gouging retailer who tries to charge more than the suggested retail price, or can use the suggested retail price as a benchmark from which to negotiate discounts.

Finally, even with regard to advertisements of purely retail prices, the court of appeals' opinion provides no real assurance that sellers will not have to try before a jury the issue of whether they published such advertisements as part of an unlawful conspiracy. Under the court's reading of *Matsushita*, an inference of conspiracy may be drawn from conduct so long as the inference would not "pose a significant deterrent to beneficial procompetitive behavior." *Id.* at 440. In certain industries or under the facts of particular cases, some courts might decide that retail price advertising does *not* constitute significant "procompetitive behavior," and thus may be relied upon by a plaintiff to support an inference of conspiracy. Again, AAF members are left to speculate as to the legal risks of engaging in price advertising under such circumstances.

In sum, the court of appeals' decision means that price advertisements in theory are lawful, but in practice may simply be too risky to utilize. The court's purported distinction between the dissemination of wholesale price information and the dissemination of retail price information will not realistically limit the chilling impact of this decision. The decision places a substantial burden on price advertising, and unless reversed it will surely damage the free flow of information necessary to the proper functioning of many competitive markets.

II. A COURT SHOULD NOT PERMIT AN INFERENCE OF CONSPIRACY TO BE DRAWN FROM EVIDENCE OF CONSTITUTIONALLY-PROTECTED COMMERCIAL SPEECH

There is another problem of constitutional dimensions raised by this decision, which was completely ignored by the court of appeals. As previously noted, this Court has made it very clear that mere parallel pricing by competi-

tors does not, in and of itself, constitute grounds for inferring the existence of a price-fixing conspiracy. *E.g.*, *Theater Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). The court below did not disagree; it conceded that "[s]imple interdependent pricing does not violate the Sherman Act." 906 F.2d at 448. Yet the court of appeals ruled that parallel pricing *could* be held to violate the Sherman Act if it were to occur in conjunction with public price announcements. In short, sellers engaging in lawful parallel pricing may be judged to be antitrust violators merely because these sellers also engaged in a lawful form of commercial speech —*i.e.*, dissemination of price information.

There can be no doubt that dissemination of price information—whether by means of press releases or advertisements—constitutes a form of commercial speech. *See, e.g., Central Hudson Gas & Elec. Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 580 (1980) (Stevens, J.) (commercial speech includes "a manufacturer's publication of a price list"); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976) (commercial speech includes dissemination of price information). Because the uncensored flow of information is as important to a free market economy as it is to a political democracy, this Court has given significant First Amendment protection to commercial speech during the past two decades.[1] It

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[1] *E.g., Peel* v. *Attorney Registration and Disciplinary Commission of New York*, —— U.S. ——, 110 S. Ct. 2281 (1990); *Board of Trustees* v. *Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989); *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916 (1988); *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman* v. *Rogers*, 440 U.S. 1 (1979); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431

is now well established that "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment." *Peel* v. *Attorney Registration and Disciplinary Commission of New York*, —— U.S. ——, 110 S. Ct. 2281, 2287 (1990) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

Admittedly, a person who violates the antitrust laws cannot seek refuge behind the First Amendment by contending that his unlawful conduct involved elements of free speech. Thus, the fact that a boycott may involve elements of free speech does not insulate such conduct from the proscriptions of the antitrust laws. *See, e.g.*, *F.T.C.* v. *Superior Court Trial Lawyers Ass'n*, —— U.S. ——, 110 S. Ct. 768, 779 (1990). Likewise, there is no question that an *agreement* to fix prices violates the antitrust laws, despite the fact that the agreement itself might involve some form of speech.

But this case involves an entirely different situation. The form of speech at issue—dissemination of price information—is *not* itself unlawful. Price dissemination does not violate the Sherman Act. As this Court has stated, "advance price announcements are perfectly lawful." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *cf. United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975) (mere "dissemination of price information is not itself a *per se* violation" of the antitrust laws). The court of appeals did not suggest—and could not suggest—that the defendants' announcements of prices in this case were in and of themselves untruthful or a violation of any law.

In sum, according to the decision below, conduct which is indisputably lawful (*i.e.*, parallel pricing) may be found by a jury to violate the antitrust laws, simply because the defendants also engaged in lawful, truthful acts of commercial speech. This ruling should not be

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U.S. 85 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

allowed to stand. By authorizing an inference of conspiracy to be drawn simply because the defendants engaged in lawful parallel pricing and lawful price announcements, the court below has placed a substantial and unwarranted burden on the exercise of a constitutional right.

The court of appeals inexplicably gave no consideration whatever to the First Amendment implications of its decision, and it made no effort to assess the burdens it was placing on free speech. This Court should not endorse the court of appeals' cavalier disregard of legitimate commercial speech issues in determining what inferences are permissible under *Matsushita*.

CONCLUSION

For the foregoing reasons, amicus curiae American Advertising Federation, Inc. respectfully submits that the Court should grant the petition for a writ of certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1552

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Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY MEMORANDUM

The Ninth Circuit in this case has significantly lowered the threshold showing that must be made to justify jury trial and the assessment of treble damages in conspiracy cases under section 1 of the Sherman Act, 15 U.S.C. § 1. The court's holding directly conflicts not only with *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), but also with numerous decisions in other circuits that faithfully follow *Matsushita* by affirming entry of summary judgment where, as here, plaintiffs offer evidence that is no more consistent with conspiracy than with lawful independent action. *See* Pet. 11-12. In ruling, instead, that such evidence affords a sufficient basis for trial, the Ninth Circuit has seriously weakened the effectiveness of summary judgment as a tool for weeding out meritless cases. Moreover, by sanc-

tioning the imposition of liability based on nothing more than lawful parallel pricing together with press releases (or responses to press inquiries) concerning prices, the Ninth Circuit has discarded the basic statutory requirement of concerted action. These erroneous rulings go to the heart of antitrust law and practice.

Respondents now adopt three strategies in arguing that the decision below does not warrant review. They pretend that the Ninth Circuit actually applied the same standard this Court articulated in *Matsushita*; they disregard the true scope of the Ninth Circuit's holding with respect to parallel pricing and price announcements; and they distort the factual record in an effort to suggest that the Ninth Circuit's radical revision of the *Matsushita* standard was not necessary to its decision.

1. *Respondents baldly misstate the standard that the Ninth Circuit applied.* In *Matsushita* this Court held that an antitrust defendant's motion for summary judgment cannot be defeated by circumstantial evidence that is "as consistent with permissible competition as with illegal conspiracy" and that does not "tend[] to exclude" the possibility of lawful independent action. 475 U.S. at 588. The Ninth Circuit does not like that test and refused to apply it. It held instead that a defendant's motion can be defeated by any evidence from which a conspiracy may plausibly be inferred, irrespective of the force of the competing inference of lawful independent action, so long as the court considering the motion is satisfied that permitting an inference of conspiracy would not "deter[] significant procompetitive conduct." Pet. App. A at 11a. The Ninth Circuit thus has constructed a new, non-statutory barrier to the entry of summary judgment.

Respondents offer a different reading of the opinion below. According to respondents, the Ninth Circuit departed from *Matsushita*, but only by articulating and applying a test that places an additional burden on

plaintiffs. They claim the court held that "if the plaintiff introduces evidence that 'tends to exclude' the possibility of independent action, summary judgment may nevertheless be appropriate if the inference that the plaintiff requests would deter significant procompetitive conduct." Br. in Opp. 13. Both the literal text of the Ninth Circuit's reformulated *Matsushita* standard and the way in which the court applied it demonstrate that respondents have the matter precisely backwards.

Under the Ninth Circuit's test, in order to obtain summary judgment a *defendant* first must show that "(1) the defendant's conduct is consistent with other plausible [*i.e.*, innocent] explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." Pet. App. A at 13a. If the defendant cannot satisfy the second prong of this test—a prong that even respondents implicitly concede cannot be found in either *Matsushita* or the Sherman Act—the plaintiff is not required to show even that the evidence is as consistent with illegal conspiracy as with lawful conduct, let alone that it tends to exclude such conduct. The "tends to exclude" test itself is never even reached unless the defendant establishes that it was engaged in "beneficial procompetitive behavior": as the Ninth Circuit stated explicitly, it is only "[o]nce the defendant has made such a showing, [that] the plaintiff must come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully." *Id.* at 14a.

The Ninth Circuit's reworking of *Matsushita* obviously erects an additional hurdle that *defendants* must surmount. The court was motivated by the misguided concern that otherwise a plaintiff's "circumstantial evidence alone would rarely be sufficient to withstand summary judgment." *Id.* at 10a. Respondents' suggestion that the Ninth Circuit actually is requiring *plaintiffs* to present *more* than "unambiguous evidence of collusion," Br. in Opp. 13, is patently incorrect.

Respondents' similar contention, that the Ninth Circuit actually applied the "tends to exclude" test, is equally insubstantial. To be sure, the court quoted *Matsushita*'s reference to that test, but it then promptly explained why the test should not be applied in the straightforward manner that this Court intended. *See* Pet. App. A at 8a-14a. And in fact the Ninth Circuit did not apply that test. The Court's failure to do so was outcome-determinative. It suffices to give two examples.

(1) After concluding that a conspiracy could plausibly be inferred from mere price parallelism plus evidence that some petitioners issued press releases when they raised their prices, the Ninth Circuit proceeded to explain why "permitting such an inference poses [no] problem under *Matsushita*":

> We agree that it is plausible to contend that independent considerations of self-interest would have led a company to choose to publish a price increase that it had decided to make. That does not settle the inquiry, however; the question remains whether permitting an inference of conspiracy from the fact of such publication would significantly deter important legitimate conduct.

Id. at 28a-29a. Because the court saw "no significant probability that permitting the proffered inference would deter important legitimate conduct," it held that a jury should be permitted to "decide whether [petitioners'] actions were undertaken pursuant to an agreement or understanding concerning prices or whether their activities were simply noncollusive and independent." *Id.* at 29a, 30a. In so holding, the Ninth Circuit *never even considered* whether the evidence tended to exclude the possibility of lawful independent action (and of course the evidence did not tend to exclude that possibility).

(2) In holding that respondents had "offered a plausible conspiracy theory" with respect to the shortage of gasoline, *id.* at 60a, the Ninth Circuit refused to consider

petitioners' submission that "the evidence indicates normal [lawful] business behavior." *Id.* at 64a. The court explained:

> it is not our task to decide whether we think that an inference of innocent conduct is more plausible than an inference of conspiracy. Rather, our task is to consider whether an inference of conspiracy is plausible and whether permitting such an inference would have the effect of deterring significant procompetitive conduct.

Id. The court held that respondents were entitled to put their theory before a jury because petitioners had failed to show any "procompetitive behavior that would be deterred," *id.*—once again, *without even mentioning* the "tends to exclude" test (which, once again, respondents' evidence did not satisfy).

In short, far from requiring respondents to show that their circumstantial evidence tends to exclude lawful independent action, the Ninth Circuit did not even require them to show that the evidence was as consistent with illegal conspiracy as with permissible competition. It is as if this Court had never decided either *Matsushita* or *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984), or even *First National Bank v. Cities Service Co.*, 391 U.S. 253, 280 (1968). This Court should grant review to correct the Ninth Circuit's radical departure from settled law.

2. *Respondents ignore the Ninth Circuit's holding that parallel pricing plus price publication, with nothing more, can be found violative of the Sherman Act.* The Ninth Circuit held that a jury can, if it wants, infer the existence of a conspiracy on the basis of nothing more than parallel pricing plus price publication consistent with independent self-interest. Pet. App. A at 23a-30a. This transforms section 1 of the Sherman Act—a statute that on its face applies only to contracts, combinations, and conspiracies—into a discretionary prohibition against any

independent unilateral action that may serve to facilitate price leadership. *See* Pet. 19-25. To be sure, the Ninth Circuit would require a jury to find an agreement, but it would permit the jury to do so on legally insufficient evidence—without any "evidence to show that [the defendants'] behavior differs from that which would be expected under competitive conditions." Brief for the United States at 9, *Weyerhauser Co. v. Lyman Lamb Co.* (U.S.) (No. 81-1618), *cert. dismissed*, 426 U.S. 1125 (1983).

Respondents apparently understand that the Ninth Circuit erred. That presumably is why they seek to camouflage the court's actual holding with factual assertions that the court itself did not rely upon. *Compare* Br. in Opp. 17-18 *with* pp. 6-8, *infra*. The Ninth Circuit's manifest error in permitting liability to be imposed merely for announcing prices—an error that flowed immediately from its new and improper standard for antitrust summary judgment—should be reviewed and corrected before it spawns imitative litigation and causes widespread harm.

3. *Respondents distort the record in an effort to create the impression that it justifies the result below.* This case arises on motions for summary judgment, where the underlying evidentiary facts are undisputed. Respondents nonetheless refer repeatedly to the district court's "factual findings," *e.g.*, Br. in Opp. 7, and assert without citation to the record that those "findings" were "reversed" by the Ninth Circuit on *de novo* review. *Id.* at 8. That plainly is wrong. Neither court made findings. Each court reviewed the same record without any disagreement concerning the underlying evidentiary facts.

Nor did the courts appear to disagree concerning the inferences that hypothetically could be drawn from the facts. The district court acknowledged that the facts "could be considered to be in harmony with the existence of a conspiracy if the existence of a conspiracy be assumed," Pet. App. B at 71a, but pointed out that the

"facts are at least as consistent with a finding of individual action and vigorous competition." *Id.* at 96a. The Ninth Circuit used different language but to the same effect. It characterized the respondents' inference of conspiracy as "plausible," *e.g.*, Pet. App. A at 64a, but like the district court also acknowledged that the facts were consistent with "independent considerations of self-interest." *Id.* at 28a. Where the courts below parted company was not on the facts or possible inferences therefrom but on the legal standard to be applied to those facts in determining whether to grant summary judgment.

Rather than defend the test actually applied by the Ninth Circuit, respondents argue that there was, in fact, evidence which tended to exclude the possibility that petitioners acted independently. But a review of the Ninth Circuit's opinion demonstrates that respondents have obscured the limited significance of much of the evidence in order to create the impression that their case is far stronger than even the Ninth Circuit believed it to be. It is sufficient here to discuss two salient examples.

(1) Although respondents emphasize the "substantial evidence" of "telephone contacts . . . for the express purpose of verifying [existing] prices," Br. in Opp. 4, 8, they fail to mention that such contacts ceased almost entirely by 1969. *See* Pet. App. A at 34a-35a. The Ninth Circuit acknowledged that such dated evidence could be relevant to claims within the limitations period only in "establishing [petitioners'] intent and motive in publicizing [their prices]." *Id.* at 35a. The evidence thus is merely cumulative of the testimony of various petitioners that they announced price changes, at least in significant part, in the hope that others would quickly learn about the changes and follow suit. *See id.* at 24a-25a. The court indicated, moreover, that the "fragmentary" contacts to verify prices that occurred after 1969 had no persuasive force "standing alone," *i.e.*, apart from the evidence of price publication. *Id.* at 42a.

(2) Respondents' much-trumpeted "*direct* evidence of oil company contacts with unbranded independent marketers," Br. in Opp. 4 (emphasis in original), which looms so large in their account of the facts, *see, e.g., id.* at 4, 8-9, 12, 17, is analytically irrelevant here. As the Ninth Circuit itself recognized, this "direct evidence" constituted inadmissible hearsay against all petitioners other than Chevron Corporation (the corporate successor to both Standard Oil Company of California and Gulf Oil Corporation) in the absence of sufficient other evidence to support a finding of conspiracy among petitioners. *See* Pet. App. A at 51a. The only such evidence cited by the Ninth Circuit to clear this hearsay hurdle was the very same circumstantial evidence that the court incorrectly had held sufficient to warrant trial under its ill-founded reformulation of *Matsushita*. *Id.* at 52a-53a. But for that erroneous ruling, there is *no* direct evidence that creates a triable issue of conspiracy against the petitioners—even "on the discrete issue of independent dealer contacts." *Id.* at 53a n.21.

There can be no serious dispute concerning the nucleus of facts that the Ninth Circuit considered dispositive in holding that there must be a trial on respondents' allegation of a price-fixing conspiracy: "we believe that the evidence concerning the purpose and effect of *price announcements*, when considered together with the evidence concerning the *parallel pattern of price restorations*, is sufficient to support a reasonable and permissible inference of an agreement, whether express or tacit, to raise or stabilize prices." Pet. App. A at 26a (emphasis added). That is the true factual core of this case. And, as petitioners have shown, that evidence is no more consistent with conspiracy than with lawful independent action.

For the reasons stated here and in the petition, review should be granted.

Respectfully submitted,

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---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Business Roundtable respectfully moves for leave to file the attached brief as amicus curiae in this case. The consent of the attorneys for petitioners has been obtained, but the attorneys for respondent have refused to consent.

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services, and believe it is critical that the marketplace operate competitively. They are, therefore, vitally interested in inter-

pretations of the antitrust laws that adversely affect competition.

This case involves the appropriate standards for summary judgment in antitrust cases. The issues raised are of particular importance to large business organizations like those represented in The Business Roundtable. When they make decisions on competitive strategies, businesses must consider whether their strategies may prompt suits by competitors or customers, and thus result in excessive litigation costs. A critical issue is whether unmeritorious suits, if filed, can be resolved on summary judgment without trial.

The attached brief focuses on two of the errors in the opinion of the United States Court of Appeals for the Ninth Circuit: (1) the determination that ambiguous evidence may defeat a summary judgment motion, which permits juries to reach verdicts on the basis of pure speculation; and (2) the requirement that businesses show "significant procompetitive conduct" in order to obtain summary judgment, which has no basis in any statute or rule, and establishes courts as mini-regulators. This amicus brief does not just restate the arguments in the Petition for Writ of Certiorari or focus on the specific facts of this case. Rather, the brief discusses aspects of the issues which are not addressed in the Petition and which have far-reaching practical consequences for all business organizations.

For the foregoing reasons, The Business Roundtable requests that the attached brief in support of the petition for a writ of certiorari be accepted for filing.

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BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services, and believe it is critical that the marketplace operate competitively. They are, therefore, vitally interested in interpretations of the law that adversely affect competition.

This case presents the issue of when summary judgment must be granted in an antitrust case. The opinion of the United States Court of Appeals for the Ninth Circuit replaces the summary judgment standards articulated by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), with new standards that permit plaintiffs to go to trial on the basis of purely ambiguous evidence unless the defendant can prove that such a trial would deter "significant procompetitive conduct." This ruling is of particular concern to large business organizations like those represented in The Business Roundtable. When they make decisions on competitive strategies, businesses must consider whether those strategies may prompt litigation and what the costs of litigation might be.

The Roundtable subscribes to the criticisms of the opinion below that are contained in the Petition for Writ of Certiorari. This amicus brief will discuss the deficiencies in the opinion from a somewhat different perspective, and will emphasize the broad adverse consequences of the standards invented by the Ninth Circuit panel.

First, the panel's opinion stated that *Matsushita* cannot really mean what it says. The court said that if "a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible . . . that decision would lead to a dramatic judicial encroachment on the province of the jury." [1] The court below apparently believed that it had to rescue this Court from the consequences of an inadvertent error in *Matsushita*.

The lower court is wrong. The precise language of *Matsushita* is consistent with traditional Supreme Court authority. The principle that a plaintiff cannot proceed

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[1] Appendix A to Petition for Writ of Certiorari at 8a-9a (hereinafter "App. A").

to trial on the basis of evidence that gives equal support to two conflicting inferences was clearly expressed in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333 (1933); it was applied in the antitrust context in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968); and it was definitively explained in *Monsanto Co. v. Spray Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita*.

This first mistake in the opinion below is directly responsible for another serious mistake. Because the Ninth Circuit panel was mistakenly concerned about what appeared to be an intrusion on the jury's function if *Matsushita* were read literally, it read *Matsushita* to require a further balancing test before summary judgment may be granted: namely, whether "an inference of antitrust conspiracy from circumstantial evidence . . . would have the effect of deterring significant procompetitive conduct."[2] This summary-judgment test is wrong, not only because it nowhere appears in *Matsushita*, but also because it actually creates an entirely new rule of substantive antitrust law. Under the antitrust laws, conduct either is or is not an unreasonable restraint of trade. The court below suggests in effect that there is a third category of conduct, which is not an unreasonable restraint but nonetheless is also not sufficiently procompetitive for courts to be concerned about the chilling effect of jury speculations. There are no standards in the statute or in decided law to circumscribe this putative third category.

The decision below would require a trial court *at the summary judgment stage* to engage in a full-blown and unbounded inquiry into whether certain practices are or are not "procompetitive." This is an extraordinary requirement to be embodied in a decision that purports to be concerned about too much judicial fact-finding! If

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[2] *Id.* at 11a.

allowed to stand, the decision will, of course, also undercut everything that *Matsushita* tried to accomplish. Under *Matsushita*, judges have a critical responsibility to screen out meritless litigation. The Ninth Circuit's opinion would undermine the court's responsibility to determine whether a reasonable juror could find for the plaintiff, not only on motions for summary judgment but also on motions for directed verdict or judgment j.n.o.v.

For these reasons, the decision below could have consequences that extend far beyond the specific case in issue and adversely affect the administration of justice.

I. THE DECISION BELOW WOULD PERMIT A JURY TO FIND A CONSPIRACY ON THE BASIS OF AMBIGUOUS EVIDENCE THAT IS EQUALLY CONSISTENT WITH COMPETITION.

In *Matsushita*, this Court addressed the types of evidence sufficient to establish a "genuine issue of material fact" that would require trial and thus enable a nonmovant to avoid entry of summary judgment.[3] In particular, the Court focused on whether inferences from ambiguous circumstantial evidence could establish a "genuine" issue of fact. The Court found that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 antitrust case," 475 U.S. at 588, and reiterated its prior holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id., citing Monsanto Co. v. Spray-*

[3] In *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), this Court decided that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Thus, once a movant has established the absence of a genuine issue of material fact, the burden shifts to the non-movant to demonstrate the existence of such a fact.

Rite Service Corp., 465 U.S. 752, 764 (1984). The Court specifically held:

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." [475 U.S. at 588.]

The opinion of the Ninth Circuit panel states that this Court's *Matsushita* opinion does not mean what it says: "We do not take these latter comments as suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible." [4] The principal reason given for the refusal to apply the language of *Matsushita* is that the language, taken literally, "would lead to a dramatic judicial encroachment on the province of the jury." [5] To avoid this apparent difficulty, the opinion constructed an entirely new summary judgment standard:

> In summary, we conclude that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior.[6]

Under this novel standard, the burden is no longer on plaintiffs to produce evidence that "tends to exclude" the possibility of independent action, but rather is on

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[4] App. A at 8a-9a.

[5] *Id.* at 9a.

[6] *Id.* at 13a-14a. We assume that the phrase "beneficial procompetitive behavior" means the same thing as "significant procompetitive conduct," which appears earlier in the opinion, *id.* at 11a.

defendants to show that the challenged conduct is "pro-competitive." [7] This is a serious distortion of the *Matsushita* decision.

Matsushita reaffirmed *Monsanto*'s holding that it is not "reasonable" to draw an inference of conspiracy where evidence is equally consistent with competition and conspiracy. Where the evidence is equally consistent with either ultimate fact—competition or conspiracy—a jury would have no basis on which to decide which inference was more likely than not. To permit a conspiracy inference in those circumstances would basically permit a jury to reach a verdict based on the collective guesses of its members. It would essentially be the same as permitting a jury to reach a verdict on the basis of no evidence at all.

The classic articulation of this problem appears in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333 (1933), an accident case in which the evidence equally supported two inconsistent explanations for the accident. This Court held:

> We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover. [288 U.S. at 339.] [8]

Before the decisions in *Matsushita*, *Celotex*, and *Liberty Lobby*, there was much discussion among courts and com-

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[7] The Ninth Circuit is alone among the Courts of Appeals in its burden-shifting requirements. *See generally* DeSanti & Kovacic, Matsushita: *Its Construction and Application by the Lower Courts*, 59 Antitrust L.J. 609, 626-628 (1991) and cases cited therein.

[8] This case arose in the context of a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), has clarified that the same analysis applies to both directed verdict and summary judgment issues.

mentators about the continued viability of this articulation.[9] A significant cause of the confusion was a series of cases under the Federal Employers' Liability Act and the Jones Act in which this Court seemingly renounced (without overruling) the *Pennsylvania Railroad* standard and adopted the view that the jury must resolve all competing inferences.[10]

Whatever the merits of these cases, it is clear that *Matsushita* applied the *Pennsylvania Railroad* standard for antitrust cases (even though the case was not cited).[11]

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[9] In 1951, Professor James reported the "usual" test to determine a "legitimate" inference as: "where from the facts most favorable to the plaintiff the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation, surmise, and conjecture and a jury will not be permitted to draw it." James, *Proof of the Breach in Negligence Cases (including Res Ipsa Loquitur)*, 37 Va. L. Rev. 179, 185-186 (1951). Professors Wright and Miller subsequently reported that, although courts articulated this test, "it may be that the purported test overstates the quantum of proof required," and that courts recognized "that if the evidence might reasonably lead to either of two inferences it is for the jury to choose between them." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2528 (1971) (footnote omitted). Professor Cooper similarly concluded that federal courts had shifted away from the "more useful approach" of *Pennsylvania Railroad* in favor of the view that juries should select among competing inferences. Cooper, *Directions for Directed Verdicts: A Compass for the Federal Courts*, 55 Minn. L. Rev. 903, 957 (1971).

[10] *See* 9 C. Wright & A. Miller, Federal Practice & Procedure § 2526. This Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962), an antitrust case, also has been read to support such a view.

[11] Similarly, in *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968), this Court held that a refusal to deal that was equally consistent with independent action as with conspiracy was insufficient evidence to require trial. *Id.* at 280, 286-290. In *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984), the Court also found that conduct equally consistent with competition and conspiracy would not require trial; rather, evidence that "tends to exclude" the possibility of independent action is required.

Under this standard, there is a subtle distinction between situations where juries should be permitted to choose between competing inferences and situations where they should not. The question is whether the evidence provides a basis on which a jury could make a rational choice between inferences. As explained by one commentator, Dean Friedenthal: "It is only when a trier of fact could reasonably choose between inferences that summary judgment should be denied. In some situations it is clear without question that no rational choice is possible." [12]

Dean Friedenthal posits two examples to explain the difference between circumstances in which the evidence is sufficient for a jury determination and those in which it is not. In one example, there are separate pieces of undisputed evidence that each give rise to different and inconsistent inferences.[13] In these circumstances, *each piece of evidence* "tends to exclude" the possibility of a contrary inference. The inferences are therefore competing, and the jury should be permitted to decide which inference is more probable than not. In the other example, *the only evidence* that exists is such that it is impossible to determine which inference is "more likely than not." [14] In these circumstances, "[o]ne could argue

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[12] J. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standard?*, 63 Notre Dame L. Rev. 770, 785 (1988).

[13] The example involves a person who must take one pill per day to remain alive, but will die if two pills per day are taken. The person is found dead with clear evidence that two pills have been taken. The issue is whether this was an accident, implying substantial insurance recovery, or suicide, implying much less insurance recovery. One item of undisputed evidence is that the person substantially revised his will just hours before death; another is that, around the same time, he made plans with friends for a trip the next day. *Id.* at 786.

[14] That example involves a two-car accident in which the evidence is clear that one of the drivers went through a red light, but the absence of eye witnesses or survivors makes it impossible to determine which driver was at fault. *Id.* at 785.

that this is not a case of competing inferences at all; it is really a situation in which there can be no inference." [15]

Many Courts of Appeals other than the Ninth Circuit have implicitly recognized this distinction and have decided cases accordingly. Thus, where each individual piece of evidence could give rise to an inference of either conspiracy or independent action, courts have generally upheld summary judgment and refused to permit juries to speculate.[16] Evidence of "parallel pricing," for example, is equally consistent with perfect competition or perfect collusion, and courts do not permit an inference of conspiracy if this is all there is. The opinion in *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987) (Kennedy, J.), provides another instructive illustration. Summary judgment was sustained when the same piece of evidence could give rise to three different inferences, but the jury would have no basis on which to choose among those inferences other than by speculation. 810 F.2d at 903-904.

By contrast, where separate pieces of evidence each give rise to one reasonable inference and the inferences to be drawn are inconsistent, courts typically have permitted juries to resolve the issue. In these cases, juries are implicitly selecting the pieces of *evidence* that are most significant, which is what juries do all the time.[17] They are not, however, engaging in pure speculation about competing inferences that are equally probable.[18]

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[15] *Id.* at 785.

[16] DeSanti & Kovacic, *supra* note 7, at 619-626 and cases cited therein.

[17] When juries do this, of course, they are deciding cases on the basis of circumstantial evidence. The opinion below is wrong when it suggests that a literal reading of *Matsushita* would require plaintiffs to prove conspiracies by direct evidence. *See* App. A at 10a.

[18] *See, e.g., Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988); DeSanti & Kovacic, *supra* note 7,

The *Matsushita* standards therefore do not encourage courts to invade the jury's function; they rather provide guidance for the performance of a function that must be performed by the court: namely, the assessment of whether a "genuine issue of material fact" exists for trial, which means "whether an inference adverse to the moving party is sufficiently plausible that it could reasonably be drawn by a jury." [19] Thus, the Ninth Circuit panel erred when it rejected the plain language of *Matsushita* on the ground that it impermissibly interfered with matters appropriately left to the jury.

Certiorari is appropriate here to clarify the reasons why the *Matsushita* standards for summary judgment do not invade the jury's function, not only to correct the erroneous decision below, but also to avoid further distortions of the *Matsushita* opinion by other courts that similarly do not understand it.

II. THE DECISION BELOW IMPOSES AN UNPRECEDENTED SUMMARY JUDGMENT STANDARD WITH NO LEGAL CONTENT.

The opinion below requires antitrust defendants seeking summary judgment to demonstrate that "permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." [20] Neither the Sherman Act nor Federal Rule of Civil Procedure 56 nor prior case law provides any authority for this requirement. In addition, the requirement has no legal

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at 627-628, 633-634 ("Ninth Circuit panel has strayed even farther from the *Matsushita* and *Celotex* standard. * * * This Ninth Circuit reading of *Matsushita* conflicts with other circuits' opinions applying *Matsushita.*").

[19] Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487 (1984). Judge Schwarzer proposes several considerations for courts to assess in making this determination. *Id.* at 487-488.

[20] App. A at 13a.

content because section 1 of the Sherman Act does not distinguish between independent conduct that is "procompetitive" and any other form of independent business behavior.

The opinion below explicitly acknowledges that this new requirement would compel a court to "consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement." [21] This means, that *before they could decide a summary judgment motion*, courts would be forced to conduct a regulatory kind of proceeding and decide what legal conduct is sufficiently worthy to be protected against the chilling effect of speculative jury verdicts. It is simply incredible that the Ninth Circuit panel, ostensibly concerned about judicial fact-finding, would invent such a fact-bound summary judgment test.

A. The Ninth Circuit's New Requirement Has No Legal Foundation.

Section 1 of the Sherman Act prohibits concerted action in "restraint of trade." Since all agreements restrain trade to some degree, the courts have added the gloss that a challenged restraint must be "unreasonable" to be illegal.[22] The statute therefore authorizes courts and juries to determine: (1) whether business conduct is concerted or independent, and (2) if concerted, whether it is reasonable or unreasonable. It does not create a third category of conduct that is independent and reasonable but competitively unimportant. In particular, the statute does not suggest that courts should take more care to protect "significantly procompetitive conduct" against mistaken inferences of illegality than they take to protect other kinds of lawful conduct.

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[21] *Id.* at 11a.

[22] *E.g., Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

Nor does case law under the Sherman Act support such a suggestion. *Matsushita*, on which the Ninth Circuit panel purports to rely for the origin of its new requirement, repeats the *Monsanto* caution that "courts should not permit factfinders to infer conspiracies when such inferences are *implausible*, because the effect of such practices is *often* to deter procompetitive conduct." 475 U.S. at 593, *citing Monsanto*, 465 U.S. at 762-764; emphasis added. This caution, like the rule limiting permissible inferences based on ambiguous evidence, implements the policy against jury verdicts based on unreasonable inferences. The Court did not say, however, that juries *could* rely on implausible inferences if specially procompetitive conduct were not at issue.

Indeed, the lone authority supporting the Ninth Circuit opinion's new requirement appears to be a Stanford Law Review note that describes *Matsushita* as "ambiguous" and possibly "dangerously overbroad." [23] The Note argues that the permissibility of an inference from circumstantial evidence should be evaluated on the basis of whether the inference would have an undesired deterrent effect. "In such a situation, the judge must decide whether the innocent behavior that will be deterred is important enough that further proof will be required in order to avoid this undesired effect." [24] The Note asserts that "[t]his determination will be guided by the governing substantive law." [25] But, neither antitrust law nor the Federal Rules of Civil Procedure specify how courts should assess whether business conduct is sufficiently procompetitive to qualify for the application of summary judgment standards under Rule 56.

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[23] Collins, *Summary Judgment and Circumstantial Evidence*, 40 Stan. L. Rev. 491, 492, 507-512 (1988).

[24] *Id.* at 511.

[25] *Id.* at 511; footnote omitted.

B. Summary Judgment Rules Should Apply Equally to All Claims of Conspiracy Based on Ambiguous Evidence.

Matsushita's expressed concern about the chilling effects of mistaken conspiracy inferences on procompetitive conduct does not establish the opposite proposition that there should be no concern about the effects of mistaken inferences on competitively neutral conduct. Yet this is precisely the position taken by the Ninth Circuit panel: if significantly procompetitive behavior (determined by some unspecified standard) is not involved, then an antitrust plaintiff may avoid summary judgment and go to trial simply on the basis of ambiguous circumstantial evidence.

Apart from the complete absence of any authority for such a test, there are other practical problems with it. Courts (or juries) can never know with certainty all of the competitive effects of any business practice. As Judge Easterbrook has explained:

> In most cases even a perfectly informed court will have trouble deciding what the optimal long-run structure of the industry is, because there is no 'right' balance between cooperation and competition. The judge has no benchmark. Small wonder that the history of antitrust is filled with decisions that now seem blunders.
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> * * * *
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> Antitrust is costly. The judges act with imperfect information about the effects of the practices at stake. The costs of action and information are the limits of antitrust.[26]

Given these limitations, it makes no sense to build such fact-driven and uncertain determinations into a summary judgment standard. A defendant, in effect, would

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[26] F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 3, 4 (1984).

have to prevail in a regulatory proceeding in order to establish the right to a summary disposition.

Another antitrust scholar makes a similar point. Robert Bork has argued that "in all cases in which behavior is neutral or in which analysis does not provide a basis for predicting effects upon consumer welfare, tie-breaking considerations indicate that the law should not intervene." [27] Professor Bork bases this judgment in part on the insight that courts are not likely to be able to identify conduct that truly is competitively neutral: "If the deadweight loss [of consumer welfare] and efficiency are not in fact equally balanced, then the conduct is either beneficial or detrimental[,]" and not something in between.[28] If even theoretically there is no place for the third category of conduct that the Ninth Circuit has created, courts and litigants should not be put to extraordinary burdens in order to find it.

The Ninth Circuit's opinion treats Rule 56 as inapplicable to any antitrust defendant whose conduct is not viewed as "significantly procompetitive" by the court. In *Celotex*, however, this Court admonished that "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." 477 U.S. at 327.

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[27] BORK, THE ANTITRUST PARADOX 117, 133 (1978). If the law should not intervene to prohibit conduct, it also should not inhibit conduct by a refusal to apply ordinary summary judgment standards.

[28] *Id.* at 133.

CONCLUSION

This Court's opinion in *Matsushita* was well grounded in precedent and did not sanction an invasion of jury prerogatives. A piece of evidence from which two equally plausible inferences may be drawn cannot support a jury verdict for the party with the burden of proof. It is no better than no evidence at all.

Matsushita does not need to be rescued by the Ninth Circuit, which reads things into the Court's opinion that are not there in order to avoid imaginary difficulties. Moreover, the additional requirements that the Ninth Circuit would impose on defendants seeking summary judgment have no legal content. A requirement that courts evaluate the degree to which conduct is competitively useful in the context of a summary judgment motion would add yet another layer of unbounded scrutiny to the already difficult task of applying the Sherman Act.

The Business Roundtable, as *amicus curiae*, asks the Court to accept this case for review in order to reverse the opinion below.

Respectfully submitted,

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